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IN THE

# Supreme Court of the United States

October Term, 1959

No. 304

HARRY STROMBERG and LEO SETO,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondnt.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Harry Stromberg and Leo Seto* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against them in the above entitled case on June 15, 1959.

### Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

* In the Court of Appeals, counsel for the Petitioner Stromberg was also assigned to act as counsel for the Petitioner Leo Seto, an indigent defendant. At the request of the Petitioner Leo Seto, counsel is continuing to act as his counsel on this petition for writ of certiorari, without any charge for services to this Petitioner in view of the fact that the questions presented are applicable to all the petitioners. The record indicates that the Petitioners Stromberg and Seto were not known to each other and had no transactions with each other.

## Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1959. On July 2, 1959, Mr. Justice William J. Brennan, Jr., granted an order extending the time of all petitioners in this case to file their respective petitions for writs of certiorari to and including August 14, 1959. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

## Questions Presented

1. Can the life of a conspiracy be extended to cover 6½ years and 62 co-conspirators by evidence that one of the conspirators was a member of a group of defendants who conspired to commit offenses against the United States during a period of three years, and then after a lapse of more than a year become a member of an entirely different group which conspired for the same general purposes, and there was no evidence that the remaining members constituting the trunk of the conspiracy in the first three years knew any of the central members of the later group or were aware of their activities or their purposes?

2. Do not the repeated warnings of this Court in *Krulewitch* v. *United States*, 336 U. S. 453, and in *Kotteakos* v. *United States*, 328 U. S. 750, against demands to broaden the already pervasive and wide-sweeping nets of criminal prosecutions and against the broadening of the conspiracy to include more and more in varying degrees of attachment to the confederation, compel the conclusion that the Petitioners, under the particular circumstances of this case, were denied due process because:

a. The conspiracy was broadened to include 62 co-conspirators, of whom 45 were named as defendants and of whom 18 were tried together; constituting the first time, we believe, so many were tried together since the decision of this Court in the *Kotteakos* case;

b. The conspiracy was broadened to include a period of 6½ years from January 1, 1950 to May, 1956;

c. The conspiracy was broadened to include different groups of defendants whose activities were widely separated in point of time and after March 27, 1954 when the participation of Petitioners Stromberg and Seto allegedly began, only one of the defendants was a member of the group of defendants which organized the conspiracy and continued its operation until December 1952?

3. Was the indictment of 46 defendants, which named in addition 16 other co-conspirators, on a charge of a continuing conspiracy covering 6½ years, such a stretch on the part of the prosecutor of the quasi-judicial power lodged in him and calling for this Court's supervisory power over the modes of conducting federal criminal prosecutions:

a. when proof of the alleged conspiracy during the first 3 years thereof, from January 1, 1950 to December 31, 1952, depended solely upon admissions, declarations and statements made by some of the principal members of that conspiracy to a paid Government independent employee;

b. that if the defendants making these declarations or admissions were tried alone on a charge covering that period in which they were allegedly involved, the statute of limitations would be a bar

to their prosecution, but the prosecutor by their inclusion as defendants upon a charge of a continuing conspiracy could bolster the case against the Petitioners Stromberg, Seto and others whose alleged participation began after March 27, 1954 by the sensational and uncorroborated admissions and declarations made by these defendants in the earlier years, and who were unknown to the Petitioners, and the case against the earlier defendants would be bolstered by the evidence against the later defendants;

c. when a mass trial could have been avoided by separate trials of the defendants in different groups and when the Government's evidence lent itself to a classification of the defendants in such different groups allegedly operating at wholly different periods;

d. when the three main witnesses for the Government testified as to different periods of time and to events involving entirely different defendants; and

e. when there was no danger that the defendants or witnesses would disappear as many of the principal defendants were already incarcerated for long periods of time for either other federal charges or for state offenses?

4. Was the mass trial of the Petitioners Stromberg and Seto with 17 other defendants on a charge of a continuing conspiracy covering a period of 6½ years and involving 62 co-conspirators a violation of the rights of the Petitioners under the Fifth Amendment to the Constitution of the United States?

5. Whether multiple conspiracies which operated at different times were established by the evidence rather

than a single general continuing conspiracy to the substantial prejudice of the rights of the Petitioners Stromberg and Seto?

6. If the Government hires an individual known to the Government and described in the words of the Court of Appeals in another case as a person of low moral character, whose credibility has been successfully attacked, and such employee is engaged to obtain incriminating evidence from persons suspected of participation in a conspiracy to smuggle and distribute narcotics and to bribe narcotics agents, and the Government for that purpose supplies that employee with funds for the purpose of entertaining such suspects, are declarations or statements extracted by such employee in conversations with such suspects decalarations in furtherance of the conspiracy?

7. Does not the opinion of the Court of Appeals, that statements made by these defendants to the Government employee do not constitute admissions for which corroboration is legally required, disregard and deny in effect to this Court's views that admissions or declarations which assume importance in the presentation of the prosecutor's case should not go uncorroborated as set forth in *Smith* v. *United States*, 348 U. S. 147, 155, and *Bates* v. *United States*, 323 U. S. 15?

8. Was it a misuse of the enforcement and judicial process calling for the exercise of this Court's supervisory power over the modes of conducting federal criminal prosecutions, to base the entire proof of the alleged continuing conspiracy during the first 3 years thereof upon the uncorroborated admissions made to a Government employee engaged for the purpose of obtaining incriminating evidence and who extracted these admis-

sions and declarations as the result of cleverly worded questions during drinking parties paid for with Government funds, and when the continuance of the income of the Government employee which totalled $25,000 annually and which resulted from informer's fees, compensation paid by the Government and payments for sensational articles for magazines carrying crime stories depended upon the ability of this Government employee to obtain such incriminating evidence.

9. In the setting of this case and upon a charge of a continuing conspiracy covering 6½ years, may a conviction of the Petitioners be based solely upon the uncorroborated testimony of an accomplice whose testimony upon the trial was in contradiction with the testimony this accomplice gave upon material matters on cross-examination and this testimony was elicited in a setting colored by sensational admissions and declarations of other defendants years earlier and unknown to the Petitioners?

10. Does the so-called "Jencks" Act (18 USCA, Sec. 3500) strip the Trial Judge of discretion to order the production of the memorandum made by a United States Narcotics Agent summarizing the testimony of the main witness for the Government, a co-conspirator, upon which the conviction of the Petitioners was based when such witness gave evidence at the trial which was contrary to his sworn testimony before the Grand Jury as to material matters and no attempt was made by the prosecutor to rehabilitate the witness; and when the memorandum could conceivably shed light on the question whether former statements made by the witness to the United States Narcotics Agent were consistent with the statements before the Grand Jury or consistent with his testimony at the trial?

11. Was the exposure of the jurors to newspaper articles and editorials, and which some of the jurors admitted that they read, which reported in detail a public speech made by the prosecutor during this lengthy and important trial expatiating on the menace of organized crime and referring to the Federal Bureau of Narcotics as one of the important agencies in the campaign against crime, so prejudicial in the setting of this case as to warrant the exercise of the supervisory power of this Court?

12. Did the general instruction by the Trial Court to the jury that the failure of some of the defendants to testify in their own behalf was not to be considered by the jury as any evidence against them or against any of the defendants, cure the comment of the prosecutor, which the Circuit Court of Appeals held was improper, when the prosecutor referred to one of the defendants as the only one who had the courage to take the stand and which the Circuit Court of Appeals held was tantamount to saying that certain of the defendants lacked the courage to take the stand, and when at the time this improper comment was made a motion for a mistrial was denied by the Trial Court without comment, and the prosecutor after such denial repeated his comment and the Trial Court made no attempt to correct the improper comments by an immediate rebuke or emphatic condemnation?

13. Can the above improper conduct of the prosecutor be deemed to be harmless error when it violates a provision of the Constitution and a specific command of Congress (18 U. S. C. A. 3481)?

14. Was the failure of the Trial Court to instruct any of the essential questions of law applicable to a charge of

a continuing conspiracy a denial of due process to the petitioners Stromberg and Seto when the Trial Court on the question of the Government's charge of a continuing conspiracy merely referred to the claim of the defendants that the acts of some of the co-conspirators in 1950 and 1952 had no connection with the acts of other defendants committed in 1954 and 1955, without any explanation as to how the facts were to be applied in connection with that issue and charging the jury that the issue of the question of a continuing conspiracy depended upon whether the Government witnesses perjured themselves?

15. Was it proper for the Trial Judge in analyzing and summarizing the evidence to ignore the calendar of events, particularly when the charge is one of a continuing conspiracy, and to refer to various events completely without reference to the dates when they occurred making no references to the lapses of time?

## Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions, statutes and rules involved in this case are: United States Constitution, Amendments V and VI; Title 18 United States Code, Section 212; Title 21 United States Code, Section 173; Title 21 United States Code, Section 174; Title 18 United States Code, Section 371; Title 18 United States Code, Section 3500; Title 18 United States Code, Section 3481; Rule 14 of the Federal Rules of Criminal Procedure. The pertinent text of these provisions are set forth in Appendix B annexed to this petition.

## Summary Statement of Matters Involved

An indictment in one count was returned against Petitioners and 44 other defendants and which named 16 other co-conspirators, and which charged them under 18 U. S. C. Sec. 371 with conspiring to violate 18 U. S. C. Sec. 212 (bribery of customs officials), 21 U. S. C. Secs. 173, 174 (narcotics laws) and to defraud the United States of its right to have the Customs Service administered free from corruption. The indictment sets forth thirty overt acts alleged to have been committed pursuant to the conspiracy and to affect the objects thereof. The first overt act was alleged to have been committed on or about January 25, 1951; the last overt act on September 17, 1955.

The indictment alleged that the conspiracy started on or about January 1, 1950 and continued up to and including May 1, 1956.

After the jury trial, Petitioners Stromberg and Seto were convicted. Petitioner Stromberg was sentenced to imprisonment for a period of five years, with a fine of $15,000. Petitioner Seto was sentenced to imprisonment for a term of two and one-half years. Sixteen of the other defendants tried together with the Petitioners were found guilty.

On appeal to the Circuit Court of Appeals, the convictions of the Petitioners Stromberg and Seto and the other appellants were affirmed, except as to the defendants Samnick, Danis and Snyder, whose convictions were reversed.

The trial of the case took seven weeks and the typewritten transcript totalled more than 5,000 pages.

**As to the Indictment of 46 Defendants on a Charge of a Continuing Conspiracy Covering 6½ Years (Questions Involved 1-5)**

The Petitioners respectfully submit that *certiorari* should be granted so that this Court may make its own independent examination of the record to determine whether the mass trial and the procedure adopted by the prosecutor constituted a serious threat to fairness in the administration of justice and whether or not this unprecedented charge of a continuing conspiracy covering so many years and so many defendants was not a handy tool to obscure the basic weaknesses in this case.

Because it is so easy to get lost in the wilderness of declarations, extra-judicial admissions and acts of some 62 defendants and co-conspirators, all of which evidence was put into the record without cautionary restrictions and flavored with the prosecutor's favorite sauce "subject to connection", it is important that a summary statement of the facts should have some chronological outline. In a charge of a continuing conspiracy, averments of time are expected and intended to be proved as laid. *United States v. Kissel*, 218 U. S. 601, 609 (1910).

Therefore, to begin with, a chart giving the names of the principal defendants and co-conspirators according to the dates of their appearance and disappearance will illumine the questions presented in respect to the device chosen by the prosecutor of indicting many defendants on a charge of a continuing conspiracy covering 6½ years and the other questions of constitutional magnitude. Such chart will also bring into sharp focus the significance and importance of the question, whether a charge of a continuing conspiracy beginning on January 1, 1950 and ending May 1956 could be established as to the Petitioners Stromberg and Seto when the group of defendants and co-conspirators with whom the evidence tended to show

these Petitioners allegedly conspired after March 27, 1954 included only one defendant who was a central member of the group that allegedly engaged in the conspiracy for a similar purpose during the first 3 years of the conspiracy.

FIRST PERIOD

COVERING

JANUARY 1, 1950-DECEMBER 31, 1952

DEFENDANTS AND CO-CONSPIRATORS INVOLVED IN THIS PERIOD

(Defendants before whom a numeral appears are the 19 defendants who were tried together.)

1. ARON (alleged directing head)
   BARUCHE (alleged contact with foreign suppliers)
   GELB (alleged wholesaler)
2. SAMNICK, a Customs Agent
3. DANIS, a Customs Agent
4. BUCELLI (alleged Boston representative)
   TAYLOR (alleged co-conspirator)
   MOFFIE (alleged co-conspirator)
5. BRISBOIS (alleged Canadian representative
   LEIGH (alleged co-conspirator)

SECOND PERIOD

COVERING

DECEMBER 31, 1952-DECEMBER 1953

There was no evidence of any activities by any of the defendants or the alleged co-conspirators, nor does the indictment allege the commission of any overt act in this period.

THIRD PERIOD

COVERING

DECEMBER 1953-MARCH 4, 1954

(date of arrest of Gelb)

DEFENDANTS AND CO-CONSPIRATORS INVOLVED IN THIS PERIOD

6. Behrman (alleged importer and wholesaler)
   Baruche (see above)
   Gelb (see above)
   Ewing (coconspirator and distributor)
   Vellucci (alleged smuggler and wholesaler)

The names Aron, Samnick, Danis, Bucelli, Brisbois, Moffie, Taylor and Leigh do not appear in the testimony covering this period and there was no evidence of any activities by them.

Fourth Period

Covering

March 27, 1954 (commencement date of alleged participation of Petitioner Stromberg) May 1, 1956

Defendants and Co-Conspirators Involved in this Period

Behrman (see above)
Baruche (see above)

7. Stromberg (alleged lender of funds to smugglers)
8. Teitelbaum (alleged associate of Stromberg)
9. Snyder, a Customs Agent
10. Lewis (alleged retailer)
11. De Saverio (alleged retailer)
12. Daniel Lessa (alleged retailer)
13. Nicholas Lessa (alleged retailer)
14. Puco (alleged retailer)
15. Pasqua (alleged retailer)
16. Seto (alleged retailer)
    Ewing (see above)
    Vellucci (see above)
17. Jane Perri (Vellucci's alleged helper)
    Basile (alleged wholesaler)
18. Maimone (alleged retailer)
19. Mirra (alleged retailer)

Other co-conspirators (whose names appear in the indictment). None of these other co-conspirators were involved in any of the events prior to December 1953.

In the first period of this alleged continuous conspiracy from January 1, 1950 to November 30, 1952, a period of 3 years, the core of the conspiracy under the Government's theory consisted of Aron, the alleged directing head; Baruche, the alleged purchasing agent of narcotics during the life of the conspiracy; Gelb; Brisbois (Aron's alleged Canadian representative); Bucelli (Aron's alleged Boston representative); La Bonte; Moffie; Taylor, Leigh, Samnick and Danis. The latter two defendants were Customs Agents.

The prosecutor maintained that these defendants established a large scale syndicate to import narcotics and in his arguments to the jury painted a sensational picture of Boston and Canadian "mobs", with headquarters of the syndicate at the office of Aron in New York City (83a).* Samnick and Danis were the Customs Agents who facilitated the entry of the narcotics according to the Government's claim. The proof fell very much short of these fantastic claims.

The defendant Aron was engaged in many activities international in character (see *United States* v. *Aron*, 239 F. 2d 857 (2nd Cir., 1957)). The Circuit Court of Appeals acknowledged in its opinion (Appendix to Petition, p. 19a) that during this period of the alleged conspiracy, that defendant Aron was also engaged in a legitimate business involving the importation of resistors. In fact, the first four witnesses for the Government, who were either associated with or worked for Aron, testified that at least

* Unless otherwise indicated, all references are to the joint Appendix of the Appellants in the Court of Appeals.

until the Summer of 1951, Aron was engaged in the business of importing electrical resistors (Government witnesses Taylor 116a; Montfiore 305a; Adatto 358a; Brenner 377a). When this business ended, Aron became active in visiting machine shops and plants looking for government contracts and negotiating for paper products for exportation (358a-363a). The defendant Baruche, according to a Government witness, was associated with Aron in the resistor business (447a). The defendant Gelb was associated with Kallor Machine Co., another business of Aron's (336a).

The Government's witnesses testified to various occasions when Gelb, Baruche, Samnick and Danis visited Aron at the offices maintained by him in New York City during the years 1949, 1950, 1951 and 1952 (116a, 305a, 358a). The Circuit Court of Appeals, in reversing the judgment of conviction against the defendants, Samnick and Danis, Customs Agents, held that in respect to them the association with Aron was insufficient to establish participation in the conspiracy (Appendix to Petition, p. 19a).

The Government introduced evidence of the cable transfer of funds from Aron to a numbered account in a bank in Baruche. These transfers were made between December 21, 1950 and July 6, 1951 (494a-495a). There was no evidence that these transfers were connected with or related to narcotics or the conspiracy involved in this case and conceivably could be connected with Aron's international and importing activities.

Not a single one of the first five witnesses for the Government furnished any evidence connecting Aron or any other defendant in that period in the operation of any conspiracy to import narcotics, except for two isolated declarations made by Aron, which were received in evidence without any cautionary restriction. The Trial Judge, in es-

tablishing the "ground rules" which would govern the trial, stated that all such declarations and acts of co-conspirators would be received in evidence on a conditional or tentative basis, and the Trial Judge would reserve for the charge instructions as to the proper application of such testimony (Supp. Appendix 1825a-1828a).

We furnish at this point two examples of such declarations. On one occasion (no date mentioned), Aron told Montfiore that Gelb "*had* been in the narcotics business" (309a). On another occasion and some time in 1952, Aron told the witness Montfiore of a deal between Gelb and Baruche involving $30,000, in which Aron had no part (326a). This witness was permitted to testify that Aron told him, "The less he knew about the deal the better off he would be" (326a). Curiously enough, these unsupported and indefinite statements were cited by the Court of Appeals as corroborating other and subsequent conversations of the witness Lafitte (*infra*, Petition p. 55) with some of these defendants, all of which was supposed to add up to proof that there was a conspiracy in operation.

**Testimony of Government Employee Jean Lafitte**
**(Questions Presented 6-8)**

The Government depended entirely upon the testimony of Government witness Jean Lafitte for proof of the conspiracy covering the first period from its organization until December 31, 1952. Lafitte was a criminal investigator for the Government since 1952. He was described in a previous case before the Second Circuit in *United States* v. *Reina*, 242 F. 2d 302 (2d Cir., 1957), cert. denied sub nom. *Moccio* v. *United States*, 354 U. S. 913, as a person of low moral character whose credibility had been successfully attacked. Lafitte has been used frequently as a witness for the Government in other cases and was employed

specifically for the purpose of gaining the friendship and acquaintance of persons suspected of being involved in violations of the criminal laws of the United States*. He was used in all types of cases involving others than suspected violations of the narcotic laws.

Securing evidence was a profitable business for Lafitte. Besides weekly compensation of $100, Lafitte received informer's fees and his services were in constant demand by public commissions investigating crime. In addition, he exploited his position as a Government employee and wrote sensational crime stories for magazines for which he received sums of money. His gross income from these sources totalled $25,000 annually (177a-183a).

Lafitte's employment by the Government of course depended upon his ability to obtain results. He was able to develop a special technique for extracting incriminating admissions or declarations and as the result of very carefully worded and loaded questions. The Government placed at his disposal a Cadillac car and furnished him with large sums of money for entertainment. He used these funds for entertaining the suspects at the most fashionable restaurants and bars (114a-125a, 123a, 140a, 289a).

On July 29, 1952, Lafitte, using the pseudonym Gus Albanese, met Aron in Aron's office at 10 East 49th Street, for the first time (121a)**. Lafitte subsequently met Aron

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* *United States* v. *Sansone*, 206 F. 2d 86 (2d Cir., 1953); *United States* v. *Sansone*, 231 F. 2d 887, cert. denied 351 U. S. 987 (1956); *United States* v. *Aron*, 239 F. 2d 857 (2d Cir., 1957); *United States* v. *Kretske*, 220 F. 2d 785; remanded for new trial upon confession of error, 350 U. S. 807; *United States* v. *Reina*, 242 F. 2d 302 (2d Cir.), cert. denied sub nom. *Moccio* v. *United States*, 354 U. S. 913 (1957).

** The details of Aron's first meeting with Lafitte are set forth in the Government's brief and appendix in another case in the Second Circuit, in *United States* v. *Aron*, 239 F. 2d 857 (2 Cir. 1957)

on many occasions and at times treated him to meals at swank East Side restaurants (123a, 288a, 292a). In the course of his various meetings with Aron, Lafitte was introduced to some of the other defendants involved in this first period. Lafitte's testimony consisted of admissions, declarations, confessions or statements made by some of the defendants constituting the core of the conspiracy during the first 3 years. The testimony of Lafitte covered the period from July 29, 1952 to the month of December 1952.

Lafitte was permitted to testify as to conversations with some of these defendants. The alleged admissions extracted from these conversations into evidence were admitted without any cautionary restrictions. The nature, character and quality of these admissions which, strangely enough, the Court of Appeals held were declarations in furtherance of the conspiracy (Appendix to Petition, p. 31a) are:

Aron told him that he was president of import and export corporations and Aron laughed when he said "import"*. Aron told him that Brisbois was "his Canadian

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where the Court of Appeals affirmed Aron's conviction for transporting and conspiring to transport stolen bonds. In brief, Lafitte, using the pseudonym Gus Albanese, introduced himself to Aron as a man with much money and a munitions proposition in a Central American country. *United States* v. *Aron*, *supra*, Government's brief and appendix on appeal (pages 7, 16a).

* Lafitte was undoubtedly an experienced criminal investigator and from his experience as a Government witness in many cases he developed an amazing shrewdness and craftiness which this cold record will demonstrate. The demeanor of individuals, their acts and conduct which ordinarily would go unnoticed, became incriminating circumstances to Lafitte and he was shrewd enough to testify to and to inject these observations. If Aron cried or remained silent, undoubtedly these facts would have been mentioned by Lafitte and would become part of the mass of testimony in this record.

representative" (126)*. Lafitte overheard Gelb, Baruche and Brisbois talk about "different matters" (127a). In response to the prosecutor's question whether narcotics was openly discussed, Lafitte gave an affirmative answer which was stricken out (127a). Pressed for details as to this conversation, Lafitte testified that Gelb complained to Baruche that he was paying too much for heroin and a complaint by Brisbois to Gelb that he lost $80,000 and Gelb had to straighten out the Boston people (128a)**. Lafitte could furnish no further details. On another occasion, Aron told Lafitte that he did not want to lose $80,000 and was fed up with the whole thing (130a).

Aron suggested, according to Lafitte, that a coalyard in Boston be purchased (131a). Lafitte of course having been hired for the purpose of obtaining incriminating answers obtained from Aron the statement, "Well, we'll be using that coalyard to smuggle narcotics. It is a good deal." According to Lafitte, Gelb and Baruche turned down the suggestion.

Lafitte accompanied Aron to Boston in November 1952. Government witness, Taylor testified that this trip was in connection with a legitimate transaction. Lafitte testified to meetings in Boston with Aron, Brisbois, Bucelli and Moffie. During one of the conversations, Bucelli complained to Brisbois that he looked very independent and Brisbois said, "That can't go on any more" (138a). Aron inter-

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* Apparently upon the basis of this declaration, the Court of Appeals concluded that there was in existence a Canadian "mob", reference to which is sprinkled throughout the opinion. There was no other testimony of alleged Canadian representatives.

** Upon the basis of this declaration, the Court of Appeals found there was a Boston "mob", to which reference is made at different points in the opinion. There was no other testimony of alleged Boston representatives.

jected that "if it is a question of money maybe the matter can be straightened out" (139a).

These vague and indefinite excerpts from unconnected conversations were apparently insufficient in Lafitte's mind to establish that the defendants had been or were going to engage in the narcotics business and, therefore, to earn his pay and after much eating and drinking, he asked Brisbois pointedly what the discussions about the coalyard were all about. Brisbois was alleged to have answered: "Well, it's be a good deal for a time. Not too long ago we go through with 1200 pound of opium and six kilo of heroin" and "We made good dough but paying that 10 per cent to smuggle that thing through the boat, that's too much. I don't want it any more" (141a-142a). This statement was made in the lobby of a public hotel in Boston (142a).

Lafitte, seemingly was of the opinion that Brisbois was approaching such a state of intoxication that he was ripe for the extraction of incriminating evidence. He took Brisbois to another bar for further drinking and during this conversation Brisbois confessed to Lafitte that "the opium" came from Macao, China, through England, and then a coalyard in Boston (143a), and that Brisbois was doing some narcotic business with Maurice Thabet, a Lebanese representative in the United Nations (144a).

The remaining testimony of Lafitte covered conversations with Aron, Gelb, La Bonte, Samnick and Danis in New York after returning from Boston. These conversations took place at the most exclusive restaurants in New York City, to which Lafitte invited these defendants. Gelb suggested that Lafitte join him in the narcotics business (148a). Lafitte, pretending that he would not be interested until he knew more about the business, found that Gelb was unwilling to furnish such information and no details of the

business were given to Lafitte (148a). On another occasion, Aron introduced Lafitte to Sammick and told him that he was one of his "customs men" on the payroll (151a). Aron made a similar statement in respect to Danis (151a). Each of these statements were made by Aron after Sammick and Danis had departed. This evidence was received without any cautionary restrictions. At another dinner, Lafitte, desiring to get some information as to how these narcotics were smuggled, received a reply from Sammick to the effect that "by boat or by plane the best way to do it is to use two big suitcases" (152a). At another dinner, when Lafitte was pressing for further information and he could receive no favorable answer from Gelb (159a), Danis told Lafitte in effect that if he wanted to he could "go with a truck across" (160a). According to Lafitte, Baruche at these dinners suggested that Lafitte join the "combine" saying, "Now that you see the way we are set up, that we have in with Customs, why you don't join us?" (152a).

Curiously enough, the Circuit Court of Appeals held that as to Sammick and Danis, these hearsay declarations were too slight for submission to the jury. Furthermore, the Circuit Court of Appeals added that it was not clear that the subject matter was narcotics rather than resistors, a business in which Aron was engaged in the years 1949, 1950, 1951 and part of 1952. The Circuit Court of Appeals held that it seemed strange that narcotics conspirators should discuss such techniques at luncheon with friends not members of the conspiracy. The Circuit Court of Appeals held further that the testimony by Government witnesses, that Aron and Sammick were frequently seen in Aron's office, was insufficient basis for a finding of participation in the alleged conspiracy. On the basis of these findings, the Circuit Court of Appeals reversed a judgment of convic-

tion as to Samnick and Danis, and directed the dismissal of the indictment. (Appendix to Petition, pp. 19a-20a).

Yet the declarations, admissions and confessions made to Lafitte and the conversations overheard by him between Gelb, Baruche, Brisbois and Aron, although made under similar circumstances and many of them at the same time, were held to be declarations in furtherance of the conspiracy made during the life of the conspiracy. (Appendix to Petition, p. 31a).

The Trial Judge instructed the jury that these admissions, declarations and confessions to which Lafitte testified, constituted independent evidence against each of the defendants making the declarations. The Trial Judge ruled further that the entire conspiracy may be proved by the "sum total" of independent answers and declarations of all the alleged participants (1728a). Hence, by this ruling this dramatic testimony became evidence against the Petitioners Stromberg and Seto, although they never knew of the existence of the declarants except possibly Baruche. Even as to Baruche, there was no evidence that the Petitioners knew that he had been a member of a group which operated from January 1, 1950 to December 1952.

The testimony as to the existence of the conspiracy during this first period ending December 31, 1952 ended with the testimony of Lafitte and consisted entirely of the above declarations, admissions and confessions put into the record without any cautionary restrictions.

During the period that Lafitte was associating with these defendants, Lafitte made reports to Government narcotics agents of the Federal Bureau of Investigation and the Treasury Department (284a). Despite these leads allegedly furnished by Lafitte, there was no evidence that any of those defendants were put under surveillance or that the

Bureau of Narcotics acted upon the information furnished by Lafitte. Moreover, there was no evidence that any narcotics were smuggled or distributed during this period of time. Despite Lafitte's intimate relationship with these defendants, he was not able to purchase even a fraction of an ounce of narcotics, which is unlike the role played by Lafitte in the other narcotics cases in which Lafitte was the Government witness.

**As to the Continuance of the Conspiracy After December 1952 (Questions Presented 1-5)**

We have indicated as the second period in this conspiracy, the period between the end of Lafitte's testimony (December 1952-December 1953), there is not a single bit of testimony showing that this conspiracy allegedly in the years 1952 and 1953 was alive in the period from December 1952 to December 1953. The Circuit Court of Appeals in its opinion admits that the evidence of the conspiracy breaks off until the end of 1953. (Appendix to Petition, p. 7a).

For the period beginning with December 1953, the main witness for the Government was one James Ewing. Ewing's testimony for the period beginning with December 1953 and ending March 5, 1954, the date of the arrest of the defendant Gelb, which we have described as the third period, involved the defendants Baruche, Gelb and Behrman. As the Circuit Court of Appeals in its opinion admits the central characters of the conspiracy as it existed up to December 1952, Brisbois (alleged Canadian representative), Bucelli (alleged Boston representative), Samnick and Danis did not appear again after December 1952, and the evidence, the Court of Appeals wrote, connecting the defendant Aron to the later period is slight (Appendix to Petition, p. 11a).

Ewing was a person of the lowest moral character. The record established that he was convicted for desertion during wartime, for which he received a sentence of 7 years (636a). He was convicted also for being a sex degenerate (643a), although he claimed upon direct examination his conviction was for fighting (637a). Ewing, at the time of the trial, was awaiting sentence for separate and distinct federal and city violations of the narcotics laws in Detroit, Michigan (669a).

In December 1953, Ewing began to buy narcotics in New York from Vellucci, named as a co-conspirator, delivered to him by Tedesco, named as another co-conspirator. Ewing's testimony consisted mainly of what Vellucci "told him". At this time, Vellucci said, according to Ewing, that he was going to deal with the "mob around 50th and Broadway", and that Vellucci told him that Gelb was the head of the organization (465a). Ewing claimed he met the defendant Behrman during this period approximately a dozen times (475a). On March 5, 1954 Gelb was arrested. This was the result of surveillance by United States Narcotics Agents which began on January 20, 1954. Large quantities of narcotics and equipment were found in an apartment at 258 West 17th Street, which had been rented to a Mr. and Mrs. Kaufman (416a). All the evidence in the apartment was admitted and prominently displayed before the jury (389a), although objection was made that there was no connection between this transaction and the testimony concerning the "1950-1952 group". Apparently the Government was contending that the defendant Behrman was the link which connected Ewing's testimony with the conspiracy allegedly in existence during the period from January 1, 1950 to December 1952. For that reason testimony was offered that Behrman was a frequent visitor at the apartment of Mr. and Mrs. Kaufman (1107a).

According to another witness, Behrman was also seen at Federal Detention Headquarters talking to Gelb after Gelb's arrest on two or three occasions (419a). However, a record of the Federal House of Detention showed that Behrman and Gelb were in Detention Headquarters together on only one occasion on May 26, 1954 (505a). There was evidence that a letter was passed by another witness from Behrman to Baruche on March 6, 1954 (449a).

The Government also introduced evidence through Lafitte that he met the defendant Behrman at Aron's office in November 1952 (147a). This happened on only one occasion (146a), and there was no explanation of the facts or circumstances surrounding that meeting. The Court of Appeals, however, held that Behrman's one reported appearance at Aron's office was hardly strong enough to tie him to the conspiracy before December 1953 (Appendix to Petition, p. 11a).

The arrest of Gelb marked the end of the third period of this so-called continuous conspiracy.

**As to the Existence of the Original Conspiracy at the Time of the Beginning of the Participation of Petitioners Stromberg and Seto and as to the Nature of the Proof of Their Participation (Questions Presented 1-5, 9)**

The name of the Petitioner Stromberg appears for the first time on March 27, 1954. In the above chart, we have described the fourth period as the period beginning with March 27, 1954 and continuing until the end of the alleged conspiracy. The Government contended that the evidence during that period established that the Petitioner Stromberg and the defendants Baruche, Behrman, Teitelbaum, De Saverio, Maimone, Mirra, Seto, Daniel Lessa, Nicholas Lessa, Frand Pasqua and Sol Snyder, a Customs Agent whose conviction was reversed by the Circuit of Appeals,

were engaged in a conspiracy to violate the narcotics law and to bribe Customs officials and that this conspiracy was part of the conspiracy that was organized on January 1, 1950. The names of the central characters in the conspiracy in the first three periods, Aron, Gelb, Samnick, Danis, Bucelli and Brisbois did not appear in any of the testimony in this period.

As the Circuit Court of Appeals admits in its opinion, the link relied upon by the Government to connect these defendants with the conspiracy alleged to have operated in the earlier years was the fact that these defendants in this last period dealt with Baruchs supposed to be the contact in France with the suppliers of narcotics (492a).

The Government's main and only witness against the Petitioners Stromberg and Seto was James Ewing, whose testimony began with the period of December 1953. To establish some link between the defendants in the fourth period and the defendants involved in the third period to which Ewing testified, Ewing was permitted to testify that in July 1955, after Ewing had completed his testimony as to transactions he had with the defendants, that Vellucci told him that dealing in narcotics required money men in back of them; that they had "Customs men paid off" and that they needed Stromberg, who was a very wealthy man, to finance these deals; and that before Gelb was arrested, "Gelb was the money man in back of the outfit" (562a-565a). This evidence went before the jury without any cautionary restrictions and this hearsay declaration is the basis for the statement appearing in footnote #8 of the opinion of the Circuit Court of Appeals to the effect as follows:

> "There was substantial evidence that after Gelb's arrest, his functions in the conspiracy were taken over by Stromberg and Vellucci."

Ewing met Stromberg for the first time at the Paddock Bar and Restaurant in March 1954.

Ewing testified that he saw the appellant Stromberg in the company of Behrman and Teitelbaum at public restaurants, either the Paddock Bar or the Villanova Restaurant, on scattered occassions between April 1954 (486a) and perhaps July 1955 (562a), although there was testimony by Ewing that during the summer Stromberg was at a summer resort (570a). He testified on one occasion he was able to observe from the bar where he was standing that Stromberg turned over two packs of money to Behrman taken from Stromberg's inside pocket (549a). At the other meetings, he observed from a distance of eight or ten feet away (514a, 537a) either Behrman or Vellucci repay the sums advanced by Stromberg (514a, 517a, 518a, 540a, 548a-549a). Ewing claimed that at one meeting, Stromberg suggested Chicago was a good town for narcotics (541a) and that at one time he interceded for defendant Lewis (573a) and was helpful in settling a dispute with one Paddy Moccio (559a).

There was no other testimony connecting the Petitioner Stromberg with any alleged conspiracy to distribute narcotics and the case against the Petitioner Stromberg depended entirely upon the above uncorroborated testimony of Ewing.

Ewing's remaining testimony in reference to the defendants involved in this period was as follows: On one occasion, he saw Vellucci turn over money to the defendant Teitelbaum for Stromberg at the "Steak Joint" in Greenwich Village (554a). Vellucci "told" Ewing that Behrman was going to France to meet "Gene" Baruche, their representative in France (544a). Complaints about the quality of the heroin resulted in a promise by Baruché to leave for France and have the matter straightened out (624a).

In August 1955, Ewing accompanied Vellucci to New Jersey to meet a Customs man. He saw Vellucci carrying one suitcase and the defendant Snyder carrying another (628a). The bags were left with the defendant Pierri (629a). The suitcases, according to Ewing, contained about 25 plastic bags of heroin (621a). The Circuit Court of Appeals held that this isolated transaction of the defendant Snyder was insufficient to support the inference that Snyder knew or accepted the conspiratorial aims and his conviction was reversed.

Ewing's remaining testimony related to transactions in connection with the distribution or sale of narcotics between Vellucci and certain retailers and the defendant De Saverio (536a), defendants Daniel Lessa and Nicholas Lessa (578a), the defendant Puco (587a), the defendant Frank Pasqua (595a), and the defendant Leo Seto (599a).

As to Seto, Ewing testified that on an occasion in May or June 1954, Seto stated he would purchase a half pound of opium and almost 9 ounces of heroin (603a). Ewing could not testify as to whether there was any such sale was eventually made, or any money paid (605a). On another occasion in May 1955, Ewing testified he heard Petitioner Seto place an order with Vellucci for 1/4 of a kilo of heroin for delivery in the evening of that day (607a). Although Ewing testified he met Seto again on other occasions, he could furnish no details of any other transaction (608a).

The Petitioner Seto, testifying through a Chinese interpreter, took the stand as a witness in his own behalf. He testified that upon the dates Ewing claimed to have seen him in New York, he was employed as a headwaiter and bartender at the Cathay House in Miami Beach, Florida, and produced records to establish the dates of his return to New York (Original Record, pp. 3931-3936, 3941). He denied he ever met Gelb, Behrman, Vellucci or Ewing

(Original Record, pp. 3937-3938). He denied he ever met Stromberg (Original Record, p. 3965). The testimony of Seto was corroborated by another witness, Don Huie, who worked with Seto at the Cathay House in Miami Beach, Florida, for 8 or 9 years (Original Record, pp. 3971-3972).

Upon the basis of this testimony, Seto to whom all these proceedings must have been strange was made a party to this continuous conspiracy which allegedly commenced on January 1, 1950.

**As to the Refusal of the Trial Judge to Permit, Under Sec. 3500 of 18 USCA, the Reports Made by United States Narcotics Agent Cusack of Interviews with Government Witness, Ewing (Question Presented, 10)**

The Trial Judge had charged that if the jury disbelieved Ewing, they must return a verdict of judgment of acquittal as against petitioners, Stromberg and Seto, among others (1732a, 1765a). Ewing's testimony was vigorously assailed and was demonstrated that in respect to many material matters his testimony upon the trial was inconsistent with his testimony before the Grand Jury. For example, it was Ewing's testimony at the trial that he had seen the defendant, Behrman, about a dozen times before the arrest of the defendant, Gelb, on March 5, 1954 (474a-476a); that he had met Behrman on dozens of occasions (475a-476a); that ninety per cent of the times when he saw Behrman, the discussion was about narcotics and they talked about it with each other (774a).

In contrast to his testimony before the Grand Jury Ewing testified that he saw very little of Behrman—all in all, about four or five times, and that only on one occasion did he hear Behrman and Vellucci discussing heroin or the heroin business with Vellucci (775a, 863a-865a).

In regard to Baruche, upon whom the Court of Appeals relies as the connecting link between the various groups, Ewing testified that Vellucci spoke with Baruche practically every day (786a); that Vellucci had, on several occasions, told him that Baruche was the organization's representative in France (492a, 615a, 784a-786a); third, that there were other conversations in which Baruche was mentioned in Ewing's presence (786a-787a, 796a-798a) and last, Ewing referred to Baruche on at least eight different occasions during his direct examination (492a, 615a-624a).

Yet, before the Grand Jury Ewing testified that Vellucci told him that the heroin was coming from certain Frenchmen in France. Ewing testified before the Grand Jury that he met Baruche with Vellucci in the summer of 1955. Vellucci told Ewing that Baruche was a friend of his but "did not tell me that Baruche was his connection in France. There was very little discussed about Baruche"; that Vellucci never discussed Baruche's business with him. With these and other vital discrepancies which the prosecutor admitted (802a), the prosecutor realized that Ewing needed rehabilitation for his whole case against the petitioners, Stromberg and Seto and many others, depended upon Ewing's testimony.

The prosecutor did not adopt the normal procedure and attempt to show prior consistent statements. Instead, the prosecutor with the Trial Court's permission, over strenuous objections, inquired from Ewing in substance whether the questions asked him before the Grand Jury were in the same form and manner as the questions directed to this witness by the prosecutor and the attorneys for the defendants (876a-885a). Ewing, buying leniency with his testimony, gave the expected negative answer (879a).

Between September 1956 and May 1, 1957, U. S. Narcotics Agent John T. Cusack interviewed Ewing and prepared

a report as a result of these interviews (Government's Exhibit 105 for identification). This report was prepared from longhand notes that the U. S. Narcotics Agent had written as the result of his interviews with the witness, Ewing (820a). The longhand notes were destroyed (820a). The notes were not signed by, nor were they seen by Ewing (828a). Agent Cusack testified that his purpose in preparing the report was to set forth the testimony that Ewing would give in the investigation (820a). U. S. Narcotics Agent admitted from time to time that he would refresh Ewing's recollection in subsequent interviews from this report (825a).

The attorney for petitioner, Stromberg demanded the right to examine these reports (828a). The Trial Judge denied the motion, basing his decision on Section 3500 of the Criminal Code. Further objection was made insofar as Section 3500 was inconsistent with the decision of the Supreme Court of the United States in *Jencks* v. *United States*, 353 U. S. 617, it was unconstitutional (836a). The Court of Appeals in its opinion held that Section 3500 was a valid exercise of Congressional power and that the Government's refusal to disclose the report was plainly right upon the ground that it was not "substantially verbatim" nor "recorded contemporaneously" and hence not within the purview of 18 U. S. C. A. Section 3500.

### As to the Conduct of the Prosecutor in the Issuance by Him of a Press Release of a Speech Made by Him During the Trial (Question Presented 11)

During the course of the trial, the prosecutor issued a press release in regard to a speech made by the prosecutor and which was reprinted in the New York Herald Tribune and Daily News and marked for identification as Government's Exhibits Nos. PP, PP1 and PP2 Id. (1513a-

1514a). The prosecutor admitted distribution thereof to the press (1516a). This release was given by the prosecutor although defendant's counsel had previously objected to a television appearance by the prosecutor, and based upon that objection he refrained from making such an appearance (1514a).

In one of the newspapers, the speech made by the prosecutor occupied a prominent place on the editorial page. As the Circuit Court of Appeals points out in its opinion, the United States Attorney expatiated on the menace of organized crime. The article mentioned the Federal Bureau of Narcotics among the federal enforcement agencies which constituted an important element in this campaign against organized crime. The agents of the Federal Bureau of Narcotics were important witnesses in this case. It was clearly established that the articles had been seen and read by some of the jurors (1522a).

The Trial Judge, at the request of counsel for one of the defendants, refused to poll the jury. The Trial Judge did admonish the jury to disregard anything that was said in that speech as reprinted (1520a-1521a).

The Circuit Court of Appeals in its opinion held while it was unfortunate and undesirable for a prosecutor to make a speech while conducting an important trial, the speech was not prejudicial to the defendants whose convictions were affirmed in view of the judge's admonition and its finding that the prejudice was too remote to affect the fairness of the trial. The Circuit Court of Appeals wrote (Appendix to Petition pp. 25a-27a):

> "Because the article contained comment about the bribery of law enforcement agencies, it may have had a more direct thrust against the Customs officers on trial below than against the other appellants."

**As to the Improper Conduct of the Prosecutor in Summation (Questions Presented 12, 13)**

Almost at the very beginning of his summation, the prosecutor made the following statement to the jury (1545a-1546a):

> "I do not know how many witnesses the Government had but witness after witness, Lafitte, Ewing, Basile and the corroboration of the agents, Montefiore, Addato, Lea, Brenner, of Rojas, who was the tenant opposite Joan Kaufman down at 258 West 17th Street, all the corroboration of the hotel record, even defense witnesses were corroborating them, *even Brisbois, who had the courage* to take the stand, corroborated—" (Italics ours)

Immediately upon the making of this comment, the following took place:

> "Mr. Edelbaum: Your Honor, we move for the withdrawal of a juror and for a mistrial by the very implication of that statement. It is a very subtle way—
>
> The Court: Denied.
>
> Mr. Stim: We join in that motion, Your Honor.
>
> The Court: I will assume that whenever one of you makes a motion that everybody will join with him."

Not content with having once made the foregoing statement, the prosecutor immediately thereafter repeated it (1546a):

> "*Brisbois, who had the courage to take the stand,* even corroborated Lafitte. What do you think of that." (Italics ours)

The Trial Judge did not rebuke or reprimand the prosecutor or instruct the jury at that time to disregard the improper remarks of the prosecutor.

Of the defendants on trial, only the defendants Brisbois and Seto took the stand in their own behalf.

The Circuit Court of Appeals held that this comment by the prosecutor was error, for it was tantamount to saying that certain of the defendants lacked the courage to take the stand. The Circuit Court of Appeals held that in the context of a long trial and in view of the Court's general instruction, the incident was not so prejudicial as to require a new trial. (Appendix to Petition, pp. 28a-29a).

**As to the Charge of the Trial Court (Questions Presented 14 and 15)**

This question relates to whether or not the Trial Judge properly performed his prime function of giving to the jury reasonable guidance as to the application of the facts to the crucial issue whether or not there was a continuing conspiracy as alleged in the indictment. The Trial Judge in respect to the issue of a continuing conspiracy charged the jury as follows:

> "More specifically, they contend that there is insufficient evidence to show a connection between the alleged acts of Aron, Gelb and others in New York during 1950 and 1952, the conversations and acts in Boston in which Brisbois and Bucelli allegedly participated, the alleged meetings between Stromberg, Vellucci, Teitelbaum, Behrman, Ewing and others in 1954 and 1955; the alleged distribution by Vellucci and Ewing of narcotics to De Saverio, Puco, Pasqua, Seto and the Lessa brothers, the alleged statements and acts of customs men and the alleged distribution and purchase of narcotics by Maimone and Mirra."
>
> "In short, they contend that the Government witnesses have perjured themselves; and this will be a basic question for you to decide in this case."

It should be noted that the question of a continuing conspiracy was submitted to the jury in an indirect way by stating very perfunctorily the contentions of the defendants

and making the issue of the question of a continuing conspiracy depend upon the question of whether or not the Government witnesses perjured themselves.

This was a serious distortion of the contentions of the defendants for the issue of the charge of a continuing conspiracy did not depend upon the issue as to whether or not the Government witnesses perjured themselves. Certain witnesses clearly testified to the truth of activities of various defendants in various years. The contention of the defendants was that although such testimony may be true, the evidence did not establish a continuing conspiracy making all of the defendants liable for the acts committed in either prior or later years by other defendants.

This crucial issue of a continuing conspiracy was further complicated by the fact that the Trial Judge stated the evidence completely out of sequence, when clearly the time sequence of the various events was most significant.

Referring to the participation of the Petitioner Stromberg in this alleged conspiracy, the Trial Judge made the following comment (1724a):

> "There is the further testimony of Ewing that Vellucci told him that $50,000 was needed to finance such an arrangement and that Stromberg was the man who would put up the money, and that subsequently defendant Stromberg in the presence of Teitelbaum and Vellucci handed Behrman two packages of money. It is the Government's position that by these payments Stromberg assumed the role of financing the narcotics operations and they urge that such a conclusion is inescapable from the testimony of Ewing that a week after the initial payment by Stromberg, Behrman and Vellucci told Stromberg that they received a shipment of heroin and that they would have some money for him in about a week or two. Thereafter, they urge that

several payments were made by Behrman and Vellucci to Stromberg.

*As further evidence of the existence of the alleged conspiracy, there has been testimony of the transfer by Aron of sums of money to Baruche's numbered account in a Swiss bank.*" (Italics ours)

The events referred to above in regard to the testimony of Ewing and the payments by Stromberg of certain sums of money took place after March 27, 1954. There was no evidence in the record that there were any cable transfer of funds after March 27, 1954. However, immediately after referring to this testimony of Ewing, the Trial Judge refers to the testimony which dealt with the testimony of the transfer by Aron of certain sums of money to Baruche's numbered account in a Swiss bank. Concededly, these transfers took place almost four years earlier, between December 21, 1950 and July 6, 1951, at a time when the defendant Aron was conducting an active business importing resistors (494a-495a).

The entire charge was sprinkled with statements of the evidence completely out of sequence, giving the jury the distorted impression that events that took place in 1950 or 1951 were connected with statements or admissions made by other defendants some 4½ or 5 years later.

## Reasons for Granting the Writ

### I.

One of the basic questions in this case is whether the indictment of 62 co-conspirators involving 45 defendants and the joint trial of 19 of these upon a complex charge of a continuing conspiracy covering 6½ years under the particular circumstances of this case reduced the judicial process to a sham. For that reason, if for no other, cer-

*tiorari* should be granted so that this Court may make an independent examination of the record to determine whether the indictment was a great stretch on the part of the prosecutor of the quasi-judicial power lodged in him.

This Court declared in language not to be misunderstood, that a mass trial of numerous defendants will not be tolerated and warned that we dare not become careless or complacent about any attempt to invoke any such procedure of a mass trial. *Kotteakos* v. *United States*, 328 U. S. 750, 772, 773.

Since the decision of this Court in the *Kotteakos* case, *supra*, there has been a tendency, particularly in the Second Circuit, to pay only lip service to this decision and to fashion a different rule of law, especially in narcotics cases.

This case introduces a new concept in the law of conspiracy. In *Krulewitch* v. *United States*, 336 U. S. 440, and *Grunewald* v. *United States*, 353 U. S. 391, the question presented to this Court was whether an agreement to conceal a conspiracy can on the facts of those cases be deemed part of the conspiracy and extend its duration. A different technique was evolved in this case. To support a charge of a continuing conspiracy, not only did the indictment contain an allegation that it was one of the purposes of the illegal agreement to conceal the conspiracy (41a), but to further extend the conspiracy the charge was enlarged to include groups allegedly operating at widely separated periods of time.

In the present case, the scope of the conspiracy statute has been enlarged to a point which is without precedent. A new device has emerged—the three-dimensional conspiracy which has become a handy tool to obscure basic weaknesses in a case. By enlarging the scope of the conspiracy, a lengthy trial becomes inevitable. As a result,

although errors are admitted, these errors are declared to be not prejudicial "in the context of the lengthy trial".

An examination of the record in this case will disclose that the conspiracy net was stretched in three directions. It was stretched to include as among the other purposes of the conspiracy an agreement to bribe customs officials, and to defraud the United States of its rights to have the Customs Service administered free from corruption. This, despite the fact that the Court of Appeals found that the testimony against the three Customs Agents joined as defendants was wholly insufficient to support their conviction. Their joinder as defendants nevertheless permitted the prosecutor to paint a dramatic picture of Boston, Canadian and New York mobs, using Customs Agents to aid in their illegal activities.

The net was stretched in another direction to include 62 co-conspirators. Finally, the net was stretched in point of time to cover, as alleged in the indictment, 6½ years from January 1, 1950 to May 1956. Actually, the prosecutor upon the trial introduced evidence of declarations and conversations from 1949 to 1957.

This is a new development in the law of conspiracy. The Nürnberg trial, although it was prompted by crimes as numerous, and as horrible and as far-reaching as the world ever heard of, as everyone knows, resulted in the acquittal of a certain number of defendants of the conspiracy count which was presented by the United States. The tribunal presided over by learned and experienced judges adopted a limited construction of "conspiracy", so that the acts of the persons adjudged to be guilty would not be too far removed from the time of decision and action. "The Nurnberg Verdict", 60 Harv. L. Rev. 857, 871.

What was the basis for this procedure and this mass trial?

If we go behind the gymnastics in logic which appears in the opinion of the Court of Appeals, we can see how weak is the foundation for this unprecedented mass trial. The Court of Appeals wrote in support of its finding of a "chain" conspiracy as follows: "For here there was evidence of a core of conspirators (Aron, Baruche and Gelb) who were buying, importing, and distributing narcotics for sale in large quantities in successive transactions." (Appendix to Petition, p. 13a).

This statement gives the inaccurate impression that a central core of conspirators consisting of Aron, Baruche and Gelb continued throughout the lengthy conspiracy from January 1, 1950 to May 1956, and at different times different defendants attached themselves to this trunk. This statement is followed by the usual generalizations frequently found in opinions in conspiracy cases involving narcotics, to the effect that one joining a conspiracy knew that for successful operation it required a wide-spread organization.

But the Court's inconsistency is demonstrated by this earlier statement in the Court's opinion (Appendix to Petition, p. 11a):

> "It is true that many of the actors in the group described by Lafitte are not seen again after December 1952: Brisbois, Bucelli, Samnick and Danis do not reappear, and the evidence connecting Aron to the latter period is slight. The links mainly relied upon by the Government are Baruche, Gelb and Behrman. We think Behrman's one reported appearance at Aron's office is hardly strong enough to tie him to the conspiracy before 1953; but Baruche and Gelb were both central participants in each phase, until Gelb's arrest in early 1954."

Concededly, Aron, the member of the original group, does not appear after December 1952. This eliminates

Aron. The core or the trunk of the conspiracy then became Baruche and Gelb. Except for Baruche and Gelb, none of the original members of the conspiracy appear after December 1952. Gelb was arrested on March 5, 1954, (Supp. Appendix 1830a), and his then partnership with Behrman, Vellucci and Ewing ended on that date. *Graham* v. *United States*, 15 F. 2d 740 (8th Cir., 1926). The Petitioner Stromberg's participation in the alleged conspiracy began on March 27, 1954 (483a). From and after that date, the defendants and co-conspirators allegedly engaging in a conspiracy to smuggle and distribute narcotics consisted of individuals wholly different from the group that operated for the first 3 years, except for the alleged presence of Baruche in the earlier group.

At this point we are compelled to make a brief comment about a sentence which was interposed by the Court of Appeals in the portion of its opinion summarizing the evidence. It will demonstrate how desperately the Court of Appeals looked for some link between the different groups although insignificant so as to support the charge of a continuing conspiracy and avoid granting a new trial. This statement also illustrates the danger when a Judge of the Court of Appeals suddenly assumes a different function and turns to the more exciting task of a sleuth. The Court of Appeals in its opinion referring to the period beginning with December 1953 and the appearance of Ewing as a witness wrote (Appendix to Petition, p. 7a):

> "Ewing, himself a dealer in narcotics in Detroit, began to buy narcotics in New York from Vellucci, delivered to him by Tedesco. In answer to a complaint that the narcotics supplied were overly diluted, Vellucci said, according to Ewing, that he was going to deal with the 'mob around 50th and Broadway'. *Aron's Office, at this time was at 49th St.*" (Italics ours)

Why was reference made at this point to the location of Aron's office when even the prosecutor never urged that fact, if it were a fact, as having any significance? The Court of Appeals had admitted that the evidence connecting Aron to the later period is slight. What Judge Hincks overlooked was the fact that the testimony showed that Aron's office was located in April or May 1951 at 10 East 49th Street (311a). There was no evidence that the office was at the same address in December 1953, or that Aron had any office. What is more significant is the geographical fact that 10 East 49th Street is a substantial distance away from Broadway and 50th Street. It is a matter of common knowledge that any person referring to the "mob around 50th and Broadway" would not include in such geographical designation persons located east of 5th Avenue.

It is therefore clear that the only evidence upon which either the Government or the Court of Appeals relies for the purpose of connecting the defendants in the 1954 period with the defendants in the January 1, 1950 to December 1952 period, and combining them into one gigantic continuing conspiracy, is the testimony given by Ewing and contradicted by his Grand Jury testimony that the defendant Baruche was allegedly a member of the group which operated after March 1954.

The question therefore becomes whether the alleged presence of Baruche in this group was sufficient to enlarge the scope of the conspiracy retrospectively so that the defendants operating after Stromberg's alleged entry would become partners in crime with the defendants wholly unknown to them and who allegedly operated in the period from January 1, 1950 to December 1952. Previous decisions do not support such a new concept of the conspiracy statute.

"It is well settled that mere identity of content will not make identical two schemes which have no common participants, and that a scheme or conspiracy may be definitively abandoned, though some of the participants revive it later, because it is defined as much by the persons who engage in it as by the purposes they have in view." Circuit Judge Hand writing in *Van Riper* v. *United States*, 13 F. 2d 961, 964 (2d Cir., 1926), and citing *Terry* v. *United States*, 7 F. 2d 28 (9th Cir., 1925).

Similarly in *United States* v. *Andolscheck*, 142 F. 2d 502 (2d Cir., 1944), Circuit Judge Hand stated (p. 507). "It is true that at times courts have spoken as though if A makes a criminal agreement with B he becomes a party to any conspiracy to which B may enter or have entered with third persons. That is of course an error; the scope of the agreement actually made always measures the conspiracy, and the fact that B engages in a conspiracy with others is as irrelevant as that he engages in any other agreement."

In *Kotteakos* v. *United States*, 328 U. S. 750, the Supreme Court approved and incorporated in its opinion the analogy which the Second Circuit drew in its opinion in that case at 151 F. 2d 172 (*United States* v. *Lekacos*, 151 F. 2d 170):

> "Thieves who dispose of their loot to a single receiver—a 'single' fence—do not by that fact alone become confederates; they may but it takes more than knowledge that he is a 'fence' to make them such."

In *United States* v. *Siebricht*, 59 F. 2d 976 (2d Cir., 1932), the Court of Appeals held that a distinct second conspiracy will not extend the life of a prior one, although between the same individuals.

Therefore, if we attempt to define the conspiracy by the persons who engage in it after Stromberg's entry on March 27, 1954, we find this situation. On March 5, 1954, Gelb was

arrested and incarcerated in jail, and apparently has been in custody since that date. Consequently, the only person involved in the events after Stromberg's entry, whom the Government claims was a participant in the events of 1950-1952 was Baruche. The Government's contention was that Baruche was the contact between the suppliers of the narcotics in France and the group that constituted the smugglers (544a). Conceivably, his foreign connections might have been helpful to many different groups of individuals, and there is not a shred of evidence in this record that Stromberg or any of the later participants knew that Baruche was or had been associated with Aron, Brisbois, Moffie, Bucelli, Taylor, Leigh, Gelb, Danis and Samnick.

The Government's theory to support this mass trial amounts to this: that after Gelb's arrest they needed $50,000 and Stromberg was persuaded apparently on March 27, 1954 to finance a venture involving narcotics; that because Stromberg was doing what Gelb formerly did (although there was no competent evidence of this), Stromberg became partners with the 1950-1952 group by some process of reverse osmosis because Gelb in that period associated with those defendants. And this argument is made although there is no evidence that most of the central characters of the 1950-1952 period—Aron, Gelb, Brisbois, Moffie, La Bonte, Bucelli, Taylor, Leigh, Samnick and Danis, and the fictional Canadian and Boston "mobs" knew that they had a new partner. Moreover, there is no evidence of any activities by the so-called Canadian and Boston representatives in this later period.

Under the theory of the Government, the 1950-1952 conspiracy would continue indefinitely. If X took Stromberg's place in 1957, or if Y or Z took the place of other defendants and performed similar functions, the conspiracy would

then continue to cover those years, although the original co-conspirators and the organizers of the conspiracy no longer participated in any of the events. How far in point of time can conspiracies be thus extended? Under the Government's theory, the criminal liability of the defendants would descend to their heirs and next of kin.

What the Court of Appeals has overlooked is the fact that the evidence of the Government, viewed in its most favorable light, indicates different groups operating at different times.

The decisions of this Court in *Kotteakos* v. *United States*, *supra*, 328 U. S. 750, and *Blumenthal* v. *United States*, 332 U. S. 539 (1947), among others presented the difficult question as to the existence of multiple conspiracies. From these decisions have emerged the doctrine of "circle" and "chain" conspiracies. Note, "*Federal Treatment of Multiple Conspiracies*", 57 Col. L. Rev. 387 (1957). But in these cases the conspiracies were operated at the same time and the question involved was different. In the instant case, the alleged conspiracies were operating at periods widely separated in point of time. The statement by the Court of Appeals that activities by Boston conspirators in Boston were not outside of the scope of the conspiratorial agreement merely because not shown to have been known to certain of the New York conspirators. What the Court of Appeals overlooks is that there was no evidence that this alleged Boston conspiracy continued after December 1952. We overlook, of course, the fact that proof of the existence of such Canadian and Boston representatives depended upon the inferences to be drawn from the vague and scattered declarations made to Lafitte.

Are we to enlarge the scope of the conspiracy doctrine so that alleged conspirators in New York, allegedly operating in 1954, are presumed to know that there was a Boston

conspiracy which operated from January 1, 1950 to December 1952. Certainly, the answers to these questions do not lie in labels. Giving the conspiracy a name and calling it a "chain" or a "circle" conspiracy is no easy solution.* Nor labeling a defendant as a retailer, wholesaler or smuggler will satisfy the requirements of due process.

The Court of Appeals wrote that a conspiracy once established is presumed to continue until the contrary is shown. But can such a presumption operate against the Petitioner Stromberg? Can such a presumption take the place of

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* In support of the finding by the Court of Appeals of a "chain" conspiracy, the following cases were cited among others (Appendix to Petition, p. 12a): *United States* v. *Rich*, 2 Cir., 262 F. 2d 415; *United States* v. *Carminati*, 2 Cir., 247 F. 2d 640, cert. denied 355 U. S. 883; *United States* v. *Tramaglino*, 2 Cir., 197 F. 2d 928, cert. denied 344 U. S. 864.

In the *Rich* case, *supra*, the trial involved Rich and three other defendants. The period of time covered by the conspiracy appears to be a period of only three months, between June and August 22, 1956. In the *Carminati* case, *supra*, the indictment named 15 defendants and 9 additional co-conspirators. The defendants were classified into different groups. Four defendants were tried at one time before District Judge Weinfeld between January 7, 1957 and January 14, 1957 (Appendix in *Carminati* case, p. 6a). Four defendants were tried before District Judge Levet between February 26, 1957 and March 13, 1957 (Appendix in *Carminati* case, pp. 11a-12a). The overt acts alleged in the indictment covered a period between April 1, 1955 and November 16, 1956 (Appendix in *Carminati* case, pp. 19a-23a). In the *Tramaglino* case, *supra*, the conspiracy covered a period of less than a year, between May 1, 1950 and April 27, 1951 (Record in *Tramaglino* case, p. 8). The trial of the case consumed 9 court days. Fourteen defendants were found guilty but the central group consisted of 4 of the defendants. The conspiracy was compact and the central group remained constant throughout the entire period of the conspiracy. *Cf. United States* v. *Russano*, 257 F. 2d 712 (2d Cir., 1958), in which the Court of Appeals held that although the defendants were members of a conspiracy to traffic in narcotics in 1952, and so conspired again in 1955-1956, these conspiracies must be considered separate ventures and would not support a charge of a single continuous conspiracy.

proof as to the Petitioners Stromberg and Seto, that the conspiracy alleged in the indictment was still alive on the date of the alleged entry of the Petitioners Stromberg and Seto? "Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding." *Bollenbach* v. *United States*, 326 U. S. 607, 614.

Is it still not the burden of the prosecutor to establish each fact in the equation beyond a reasonable doubt? To convict Petitioners Stromberg and Seto, the Government was required to establish by substantial evidence beyond a reasonable doubt: (1) that a conspiracy was organized in 1950; (2) that this conspiracy continued and was in existence on March 27, 1954 (*Grunewald* v. *United States*, 353 U. S. 391, 396 (1957); and (3) that Petitioners Stromberg and Seto joined the conspiracy with full knowledge of its purposes. In the *Grunewald* case, *supra*, at page 396, this Court wrote that "It was incumbent on the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence on October 25, 195...* * *."

Another vital question presented in this case is whether the trial of an excessive number of defendants would itself be reversible error even though no variance exists. Please see Note, "*Federal Treatment of Multiple Conspiracies*", 57 Col. L. Rev. 387 (1957).

In the *Kotteakos* case, *supra*, 328 U. S. 750, Mr. Justice Douglas dissented from the decision of this Court because the transaction involved was simple and the guilt or innocence of a relatively small number of defendants (13) was submitted to the jury and the jury failed to convict 6 of them. Mr. Justice Douglas recognized, however, that situations could easily be imagined where the confusion on the part of the jury was likely, by reason of the sheer number of conspirators and the complexities of the facts which

spelled out the series of conspiracies, resulting in the evidence relating to one defendant being used to convict another (p. 777).

This case involves the joint trial of 19 defendants (an increase of more than 50% of the number involved in the *Kotteakos* case), upon an indictment involving 62 co-conspirators and a complex charge covering a period of more than 6 years.

One of the tests usually applied in determining whether the trial of an excessive number of defendants would violate the due process laws, or whether the case involved a multiplicity of evidentiary restrictions. Please see *Delli Paoli* v. *United States*, 352 U. S. 232 (1957). In *Blumenthal* v. *United States*, 332 U. S. 539 (1947); the Supreme Court affirmed a judgment of conviction, but as the opinion indicated the Court was influenced in part that there was no "mass trial" (332 U. S. 539, 548). Please see Note, "*The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*", 62 Harv. L. Rev. 276 (1948). For cases condemning mass trials and resulting in the dismissal of the indictment or reversal of the judgment of conviction, please see *United States* v. *Central Supply Ass'n*, 6 F. R. D. 526, 533-34, (N. D., Ohio, 1947), where the Court held that the historic right of a defendant to his day in court is diluted when he must share that day with numerous other defendants. The opinion analyzed in convincing detail the prejudice of such a joint trial. *Gwathmey* v. *United States*, 215 F. 2d 418 (5th Cir., 1954); *United States* v. *Standard Oil Co.*, 23 F. Supp. 937; *Marcante* v. *United States*, 49 F. 2d 156 (10th Cir. 1931).

The Court of Appeals mentioned in passing that this case did not involve a greater number of defendants than those involved in *United States* v. *Bruno*, 105 F. 2d 921 (2d Cir., 1939), reversed on other grounds 308 U. S. 287 (1939), and

*United States* v. *Cohen*, 145 F. 2d 82 (2d Cir., 1944), cert. denied 323 U. S. 799.

In the *Bruno* case, *supra*, although 86 defendants were indicted, the record indicated the guilt or innocence of 14 defendants was submitted to the jury. 12 defendants were convicted and 2 were acquitted. The conspiracy covered a 2 year period and the central characters in the conspiracy continued throughout the conspiracy, with changes only, as the Government pointed out in its brief before the Circuit Court of Appeals, in the subordinate personnel.

In the *Cohen* case, *supra*, 27 defendants were brought to trial; 13 pleaded guilty during the trial; the indictment was dismissed by consent as to 1; 11 defendants were found guilty; and 2 were acquitted. The Circuit Court of Appeals found that the defendants were the important actors in a long series of stock frauds. In that case, of course, the conspiracy was defined by the stock of the company which was being sold. However, simply because a conspiracy involves smuggling and distribution of narcotics does not make that conspiracy part of any other conspiracy which has a similar purpose.

Both the *Bruno* and *Cohen* cases, *supra*, were decided before the decision of this Court in the *Kotteakos* case, *supra*. Indeed, there is a comment on the *Cohen* case in footnote 6 of the opinion of this Court in the *Kotteakos* case (328 U. S. at p. 775).

The statement by the Court of Appeals that large conspiracies are potentially more dangerous than small ones, makes for dramatic reading but begs the question.

Similarly the Court's statement that if the defendants were tried separately the same evidence would have been admissible subject to connection likewise, begs the question. This statement overlooks the fact that these defendants could easily have been tried in separate groups covering

the periods during which they allegedly operated. In other words, Aron, Baruche, Sammick, Danis, Bucelli, Moffie and Brisbois and the others involved in the period between January 1, 1950 to December 1952 could have been tried on a charge of conspiracy covering those years. In that case, the acts and declarations and transactions occurring in 1954 and thereafter would not have been admissible. Similarly, Petitioners Stromberg, Seto and the others involved in the period after 1954 could have been tried together on a charge covering the years beginning with March 1954. In such a case, these defendants would not have been bound by the confessions, acts and declarations of individuals they never knew existed and no such evidence would have been admissible.

The facts lent themselves to that classification. There was no danger that the defendants or witnesses would disappear. Aron was already in jail for a long time for another charge. Behrman and Gelb were and still are incarcerated in jail for long terms for state convictions. Vellucci was in jail. DeSaverio was in jail. Several of the other defendants likewise were in jail on other charges. The motion for severance made before the trial (69a) and renewed from time to time during the trial and with constant objections to the "mass trial" should have been granted (Supp. Appendix, 1933a-1955a; Appendix 1140a, 1149a). See also *United States* v. *Haupt*, 136 F. 2d 661 (7th Cir., 1943).

If the test as to the existence of a multiplicity of evidentiary restrictions is a proper one for determining the legality of a mass trial, then clearly the record of this case demonstrates the serious unfairness of this trial.

It was one of the "ground rules" that all testimony of the defendants and co-conspirators not made in the presence of all the defendants would be received in evidence

on the conditional or tentative basis and that the court would reserve for the charge instructions as to the proper applicatic of such testimony (Supp. Appendix, 1825a-1828a). The Court in its charge confirmed this arrangement (1727a),* although the general rule is that "the court must be careful *at the time of the admission* and by its instructions to make it clear that the evidence is limited as against the declarant only." (Italics ours.) *Delli Paoli* v. *United States*, 352 U. S. 232, 238 (1957).

Consequently, from the very beginning of the trial witnesses were permitted to testify as to declarations made by defendants or co-conspirators, not in the presence of other defendants and co-conspirators, though many of them were mere narrations of past events and clearly not in furtherance of the conspiracy. These declarations were of every conceivable form and there were literally hundreds of them. Indeed, the entire testimony of Lafitte, with which we shall deal separately, consisted only of declarations or statements made by some of the defendants in 1952. The other declarations or acts included among many

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* Frankly, we cannot follow the reasoning of the Court of Appeals that this procedure was more favorable to the defendants than they were entitled to. In *United States* v. *Dennis*, 183 F. 2d 201, 230-231, cited by the Court of Appeals (Appendix to Petition, p. 10a), the Court of Appeals in its opinion held that declarations either of teachers of the "principles of Marxism-Leninism" to their pupils, or if members of the Party or of the National Committee to pupils or to someone seeking admission to the Party, or at public meetings designed to secure members or to encourage the faithful, were competent as declarations made in the execution of the common enterprise. In this case, the Court of Appeals made no attempt to pass upon the competence of the numerous declarations in this record and made over a period of 6½ years. And, in view of the Trial Court's charge, it is not logical to assume that the denial of the motions for judgments of acquittal presupposes a holding by the Trial Judge that all these declarations were competent as declarations made in furtherance of the conspiracy.

others; Aron told Montfiore that Gelb "had been" in the narcotic business (309a); that Aron owed the defendants Samnick and Danis money (318a); that Samnick and Danis were useful in expediting red tape in connection with the shipments of resistors (320a); that Gelb had taken $30,000 from Baruche in respect to a transaction which Aron described as one which the witness Montfiore was better off if he did not know about (326a); the admission in evidence of the cable transfers of funds in the early part of 1951 to Baruche's numbered account in Switzerland (494a-495a); the admission into evidence of the narcotics and machinery seized upon Gelb's arrest (Supp. Appendix, 1828a-1829a).

Ewing's testimony was completely saturated with statements by Vellucci to Ewing narrating past events (474a, 482a, 492a, 529a, 555a, 560a, 562a, 563a, 564a, 585a, 591a, 609a, etc.). Although the trial court had indicated that this testimony was to be received in evidence with cautionary instructions at the end of the case, there were objections from time to time (108a, 321a, 388a, 389a, 416a, 513a, 532a, 592a, 1188a, 1190a-1191a) and, upon the assurance by the prosecutor that the evidence would be connected, the court permitted the evidence to be introduced commenting from time to time that he would give the necessary instructions in his charge (237a, 531a-532a, 896a). Specific and detailed motions were made at the conclusion of the Government's case to strike a great many of these declarations from the record (1097a, 1106a, 1123a, 1125a, 1159a-1192a). All of the motions were denied.

Such declarations included a stipulation made at the trial to the effect that the defendant Snyder met Aron or Baruche as the result of an introduction by the defendant Danis at 17 East 42nd Street in either 1949 or 1950 (924a). The jury at the time of its admission was not cautioned as

to the use it could make of that stipulation. The trial court in its charge for the first time instructed the jury that this stipulation could be considered as proof only against Snyder and not the other defendants (1776a).

The Court of Appeals wrote that it would not be difficult for the jury to comply with the judge's instructions requiring them to determine the individual guilt or innocence of the defendants and the opinion conains a generous porion of the Trial Judge's charge in that respect. It is sufficient to say that this verbal smoke screen cannot obscure the truth that this mass trial made the adjudication of the guilt or innocence of the individual defendants impossible.

Why did the prosecutor select this method of procedure?

The caption of this criminal case reveals the secret for the procedure adopted by the prosecutor. Petitioner Stromberg is named first in the indictment, although concededly he did not originate the scheme, nor was he ever an active participant. The case against petitioners Stromberg and Seto was weak. The case against the 1950-1952 group, based as it was on the testimony of Lafitte alone, was not strong. Moreover, if the prosecutor had proceeded against the 1950-1952 group, on the basis of the acts committed by them during that period, the prosecutor would have been confronted with the question of the Statute of Limitations and the testimony of Lafitte would stand out prominently. By proceeding in this form, the weak case against Aron, Brisbois, Danis, Samnick, Baruche, Moffie, Bucelli and Taylor would be bolstered by the acts and declarations of the 1954-1956 group. On the other hand, the case against Stromberg and Seto, depending upon the testimony alone of a discredited witness, would be bolstered by this form or procedure by the sensational story of Canadian and Boston mobs using the coalyard for smuggling, the evidence of cable transfers in 1951 and the events during those years.

It is plainly apparent that the continuity of the alleged conspiracy lay wholly in the mind of the pleader and not in the proof, and this form of device was a handy tool to obscure these weaknesses.

We respectfully submit that *certiorari* should be granted so that this record may be examined by this Court to determine the constitutional justification for this unprecedented procedure.

## II.

The testimony of Government witness Lafitte raises important questions of constitutional magnitude and the decision of the Court of Appeals in respect to this testimony runs counter to decisions of this Court. *Opper* v. *United States*, 348 U. S. 84; *Smith* v. *United States*, 348 U. S. 147 (1954).

A really professional marionette artist never draws attention to the strings. In a mass trial basic weaknesses in a case become concealed by the mass of other evidence. We therefore invite a reading of the testimony of the witness Lafitte for even a cursory examination for that portion of the record will demonstrate the fundamental weaknesses in the Government's case and the refutable logic of the Court of Appeals.

Lafitte was in contact between July, 1952 and December, 1953 with certain members of the group of the defendants allegedly operating during the first three years of the conspiracy. The entire proof of the conspiracy for the first three years which is the basis of the charge of a continuing conspiracy depended upon Lafitte's testimony.

Concededly, his testimony consisted only of isolated and in most instances unintelligible conversations with the defendants, Aron, Gelb, La Bonte, Baruehe, Brisbois, Danis and Samnick

As to the defendants, Danis and Samnick, the Court of Appeals held that the comments of these defendants might be construed only as hypothetical comments as to the most appropirate smuggling technique for as the Court of Appeals stated, there was no evidence "that either Samnick nor Danis had ever actually used the smuggling technique which they mention" (Appendix to Petition, p. 20a). Upon what theory the comments of the other defendants falls in another category is impossible to fathom. We shall refer briefly to the declarations of one of the other defendants.

Lafitte wined and dined at Government's expense the defendant Brisbois. After considerable drinking, Brisbois made a statement that the opium came from Macao, went to England, back to a coal yard in Boston (143A). According to Lafitte, Brisbois also told him that he was doing business with one Maurice Thabet (144A). The Trial Judge in its charge held that not only was this independent evidence admissible against Brisbois but under the Trial Judge's charge this evidence became independent evidence against the petitioners Stromberg and Seto who first entered the alleged conspiracy in March, 1954 although they never knew or heard of this defendant (1728a).

The Court of Appeals held this declaration by Brisbois and similar declarations by some of the other defendants were declarations made during the life of the conspiracy and in furtherance of the conspiracy and for which no corroboration was legally required. It should be noted at this point that there was not a single bit of evidence that any opium was imported from Macao or that a coal yard was actually used for the purpose of smuggling techniques. In fact, the theory of the Government was that the suppliers of the heroin were in France and that the defendant Baruche was the contact man (544a). From all that appears

in the record this statement by Brisbois might have been the fanciful chatter of a drunk.

Brisbois took the stand as a witness in his own behalf and denied that he had any such discussion with Lafitte (1489a). He admitted that he did business with Maurice Thabet, who was councillor for Lebanon in Ottawa (1498a). Brisbois had a concession at the Chateau Loriet for guest cars and in that connection he bought and sold automobiles and as part of his business he purchased automobiles from diplomats including one from Thabet (1491a). There were received in evidence exhibits giving details of these purchases (1493a-1499a).

The Court of Appeals in its opinion stated that Lafitte's testimony was corroborated in many particulars, citing as an example the testimony of the witness Taylor (Appendix to Petition p. 30a). The reference to this witness is a clue to the lower Court's conception of what type of evidence constitutes corroboration. The Government's witness Taylor testified that he accompanied Aron to Boston on November 9, 1952 (117a). Taylor was engaged in the business of television tubes and resistors and had many transactions with Aron in March in that business (116a). The purpose of the trip, according to Taylor, was a transaction involving the sale of coal to Hingham Ship Yard for which a commission was to be paid (117a). Taylor testified that Aron, Bucelli and Leigh were associated in that transaction (117a). The transaction was consummated and he participated in the commission (117a). Taylor admitted that he met Lafitte in the company of Aron.

Does the fact that these defendants were in Boston corroborate the truth of the declarations or admissions made by the defendants? This reference to Taylor's testimony demonstrates how farfetched is the reasoning of the Court. The Court of Appeals does not refer to the other testimony

which is supposed to have corroborated Lafitte except at another point in the opinion. In summarizing the testimony of the Government's witnesses, the Court of Appeals referred to testimony given by other witnesses showing the association of several of the other defendants in 1949 at a time when Aron was engaged in importing resistors for television tubes. In what respect does this testimony corroborate the truth of the declarations made to Lafitte years later?

In respect to the defendants Samnick and Danis, the Court of Appeals held that this association in these years between various defendants was insufficient basis for a finding of a participation in a conspiracy involving narcotics. Upon what basis then can the alleged declarations made to Lafitte in the latter part of 1952 be colored retrospectively by the association of some of the defendants in other transactions in years or months earlier? The cable transfer of funds from Aron to Baruche took place between December 21, 1950 and January 16, 1951 (494a-495a). There was not a single bit of evidence that these transfers were connected with any transactions involving narcotics.

The Court of Appeals apparently took the view that a statement made by Aron in 1952 or 1953 to Government witness Montfiore of a deal between Gelb and Baruche involving $30,000 in which Aron had no part (326a) corroborates the declarations or admissions made to Lafitte and which according to the Government added up to proof that the defendants including Aron were then actively engaged in a conspiracy as alleged in the indictment (Appendix to Petition, p. 6a). In other words, corroboration for a declaration is found by the Court of Appeals in another declaration.

What is more serious, however, and which compels the scrutiny of this Court is the finding by the Court of Ap-

peals that the equivocal declarations made to Lafitte were declarations made in furtherance of the conspiracy, during the life of the conspiracy for which corroboration is not legally required. This finding, of course, assumes that there was a continuing conspiracy although most of the declarants do not appear on the scene after December, 1952. The generalization that the declarations were in furtherance of the conspiracy is not supported by the record. Lafitte was a clever, calculating, professional witness earning large sums of money and who had developed a technique of asking loaded questions designed to obtain incriminating answers. This is not a situation where a declaration is made in the course of the performance of the agency and as a step in the execution of the common purpose. Cf. *United States* v. *Campisi*, 248 F. 2d 102 (2d Cir., 1957). In only two isolated instances did Lafitte interject testimony that the defendants were seeking his active participation. (Please see pages 148a and 152a.) Whether such invitations took place is beside the point but the declarations constituting the proof of the base of this conspiracy were not made in connection with such invitations or in execution of the alleged conspiracy but were extracted by the witness Lafitte in his talented manner.

The question we have presented is not whether the Government may or may not use "dirty business" or informers or co-conspirators to obtain evidence. The question presented does involve the determination of the issue whether the Government if it uses a witness such as Lafitte to obtain incriminating declarations whether the testimony of that witness must be corroborated? The decision of the Court of Appeals is contrary to its own decision in *United States* v. *Aron*, 239 F. 2d 857 (2d Cir., 1957), citing the decision of this Court in *Opper* v. *United States*, 348 U. S. 84 (1954),

and involving declarations and admissions made to Lafitte, the Government's principal witness.

In the *Aron* case, *supra*, the Court of Appeals held that admissions or declarations made to this same witness Lafitte, similar in form and obtained in the same manner, were extra-judicial statements amounting substantially to confession of guilt and requiring corroboration.

This Court has held that an issue which assumes importance in the presentation of the prosecutor's case should not go uncorroborated and that all elements of the offense must be established by independent action for corroborated admissions. *Smith* v. *United States*, 348 U. S. 147, 155 (1954). The base of the entire alleged continuing conspiracy depended upon the testimony of Lafitte. In *Bates* v. *United States*, 323 U. S. 15 (1944), the petitioner made certain incriminating admissions to a Government agent who posed as an owner of a gold mine. The Government agent was introduced to the petitioner by a confidante of the petitioner. Upon the appeal to this Court, the Government itself came forward and conceded that the admissions were sham. This Court reversed the judgment for a conspiracy conviction and made special mention of the fact that the Government failed to produce evidence to establish any truth in these admissions, although the petitioner was under almost constant surveillance by Government agents.

In other cases in which Lafitte appeared as a witness, his testimony was corroborated by Government narcotics agents who either overheard the conversations by means of recording devices or participated with Lafitte in various transactions. Please see *United States* v. *Sansone*, 231 F. 2d 287, (2d Cir., 1956) and *United States* v. *Kretske*, 220 F. 2d 785 (7th Cir., 1955).

This is the first case in which proof of a conspiracy to smuggle and distribute narcotics is predicated entirely

upon declarations or admissions made by several of the co-conspirators. This proof is supposed to constitute the base of the conspiracy. Certainly if no conspiracy was in operation from January 1, 1950 to December 31, 1952 there cannot be a continuance of that conspiracy.

Not a single Agent of the United States Narcotics Bureau testified as to any transaction in narcotics during that period. Is it not strange that despite the intimacy of Lafitte with the defendants during a six month period and during which he spent large sums of money, he was not able to purchase a single ounce or kilo (whatever the proper measurement may be) of heroin.

In 1952, Lafitte made reports to Government Narcotics Agents, the Federal Bureau of Investigation and the Treasury Department covering the period from July 29th to November 20, 1952 (284a). If declarations made to Lafitte constituted independent proof of the conspiracy as the lower court ruled, why was not a prosecution commenced then instead of six years later? And if, as the Government contended, the seizure of large quantities of narcotics in the possession of Gelb in 1954 was tied up with the conspiracy in 1952, because Gelb associated with the defendants in 1949-1952, the conspiracy had been consummated by the commission of the substantive offense. Completion of the object of the conspiracy completes the conspiracy. *Cleaver* v. *United States*, 238 F. 2d 766 (10th Cir., 1956).

Certainly with the information that Lafitte furnished, if the report of Lafitte amounted to anything, Samnick, Danis and some of the others might have been put under very strict surveillance. We can assume that they were and that the investigation disclosed no such conspiracy as sought to be deduced from the declarations made to Lafitte.

The recent decision of this Court in *Holland v. United States*, 348 U. S. 121 (1955), involving the application of the "net worth" theory in income tax evasion cases establishes certain principles which we believe are particularly appropriate in the instant case. We believe the decision stands for the proposition that in law enforcement it is the duty of the Government to track down relevant leads reasonably susceptible of being checked which, if true, would establish the defendant's innocence (pp. 135-136). In that case, the leads were furnished by the taxpayer. This Court held that when the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury (p. 136).

In this case the leads were furnished by Lafitte's reports. Why should the prosecutor be permitted to rely upon scattered declarations made to a Government investigator, particularly if those declarations assume such importance in this case, when the Government with the resources at its command could have tracked down the relevant leads with little difficulty?

We respectfully submit that *certiorari* should be granted so that the record may be carefully examined to determine whether this is not a case of lazy law enforcement which should not be tolerated and which only a mass trial of many defendants on a complex charge of a continuing conspiracy can conceal and obscure. Shall such lax practices of establishing a conspiracy be permitted? *Certiorari* should be granted so that this Court may make its own independent examination of the record to determine whether this case calls for the exercise of the Court's supervisory power to formulate and apply proper standards for the enforcement of the criminal law in the federal courts.

## III.

Another basic question in this case relates to the application of the so-called "Jencks" Act, 18 U. S. C. A., Sec. 3500, and is one which we believe has been reserved or at least which four Justices of this Court held should have been reserved in *Palermo v. United States*, — U. S. —, 79 S. Ct. 1217 (1959), that if the jury did not believe the testimony of Ewing concerning the defendant Stromberg, then they must find Stromberg not guilty (1732a). A similar charge was made in respect to the Petitioner Seto (1765a).

Ewing was an accomplice awaiting sentence for violations of the narcotics laws in the City of Detroit, State of Michigan. He was a person of the lowest moral character and a demonstrable perjurer. His testimony before the Grand Jury in respect to material matters was inconsistent with his testimony at the trial. Ewing in his testimony before the Grand Jury stated that although he met Baruche with Vellucci once in the Summer of 1955, there was never any discussion about Baruche's business. This was completely contradictory to his testimony at the trial and which, according to the Government, furnished the vital link to the group which operated after 1954 and the co-conspirators engaged in the period from January 1, 1950 to December 1952.

The truthfulness of Ewing's testimony was determinative of the guilt or innocence of the Petitioners Stromberg and Seto. The Petitioners' liberty may well have depended on such subtle factors as whether prior statements of Ewing were inconsistent with the testimony at the trial or his testimony before the Grand Jury. The prosecutor admitted that there was a discrepancy in the testimony (802a), and apparently realized that the witness needed rehabilita-

tion. Consequently, the last testimony of Ewing heard by the jury consisted of a most unusual redirect examination and consisted of questions directed by the prosecutor, whether the questions asked the witness before the Grand Jury were in the same form and manner as the questions directed to the witness by the prosecutor and the attorneys for the defendants (876a-885a). By this unusual method, the prosecutor attempted with one sweep of the brush to destroy all of the sworn contradictions in Ewing's testimony.

The general rule is that to rehabilitate an impeached witness it is proper under certain circumstances to introduce in evidence prior consistent statements made by the witness. *Di Carlo* v. *United States*, 6 F. 2d 364 (2d Cir., 1925).

It is therefore clear that the statements made by Ewing to the United States Narcotics Agents during the many months that this case was being prepared became most material in establishing the truth.

This Court has held in *On Lee* v. *United States*, 343 U. S. 747, 757 (1952), that to the extent that the Government uses accomplices, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.

The function of a trial is to ascertain the whole truth, not merely the prosecutor's version. It is therefore surprising that under the particular circumstances of this case the prosecutor did not volunteer to produce that statement. Denial of access to this summary of Ewing's testimony as the result of the interviews clearly frustrated cross-examination and deprived the Petitioners of a fair opportunity to present the whole truth. This was not an attempt by the Petitioners nor the defendants to obtain unlimited access to the files of the Government or obtain the names of con-

fidential informers. No showing was made by the Government that harm would result from the disclosure.

The contention of the prosecutor, and which the Court of Appeals upheld, was that the Trial Judge under Section 3500 had no discretion to permit the examination of this report.

In the *Palermo* case, *supra*, the majority of this Court explicated the construction of the statute required by the particular circumstances of that case. Mr. Justice Frankfurter writing for this Court stated that the majority was not attempting a minute enumeration of the particular situations to which Section 3500 may be applied. While the Chief Justice, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan concurred in the result in the *Palermo* case, Mr. Justice Brennan wrote that nothing in the statute or its legislative history justified stripping the Trial Judge of all discretion to make non-qualifying reports available in proper cases.

We believe the facts of this case are analogous to the illustration given by Mr. Justice Brennan in which a non-qualifying document would be relevant evidence which in the interest of ascertaining the truth a Trial Judge must permit its production. See also, "The Jencks Legislation: Problems in Prospect", 67 Yale L. J. 674 (1958).

## IV.

*Certiorari* should be granted so that a determination can be made whether in the setting of this case the conduct of the prosecutor was improper in calling for the exercise of this Court's duty of supervision over the administration of justice in the federal courts.

Certainly it is no excuse that the public speech made by the United States Attorney during this important trial was

as the result of a prior invitation to address the alumni of a large school. Speeches have been cancelled for less important reasons. "The delicate scales of justice ought not to be wilfully agitated from without by any of the participants responsible for the fair conduct of the trial" (Mr. Justice Frankfurter dissenting in Re Sawyer, — U. S. —, 79 S. Ct. 1376, 1396, 1398, (1959) and citing the decision of the Court of Appeals in this case criticizing the prosecutor.

The statement by the Court of Appeals that the content of the speech differed little from much contemporary writing in the press on the general subject of organized crime and law enforcement is quite immaterial.

As Mr. Justice Frankfurter wrote in the same case, "to be sure a prosecutor carries a somewhat heavier responsibility in the maintenance of the standards of criminal justice than does counsel for the defense".

The case against the petitioners Stromberg and Seto, depending as it did upon the uncorroborated testimony of an accomplice, it is impossible to conclude that the possibility of resulting prejudice was too remote to affect the fairness of the trial or the validity of the convictions.

We are ready to acknowledge that it is difficult to determine the effect that any prejudicial conduct had upon the jury. What is startling, however, is the statement by the Court of Appeals that if the speech had any prejudicial effect it had a more direct thrust against the Customs officers on trial than against the other defendants. The Court of Appeals, therefore, reasons that the error was not prejudicial for the conviction of the Customs officers was reversed. This is certainly cutting the bread too thin and a new approach to the question of prejudice. It is inconceivable that any one can be skillful enough to split up prejudicial conduct of a prosecutor, which consists of an im-

proper public speech, by saying it was more prejudicial as to some defendants than as to others. The fact is that all the defendants were charged with a conspiracy which included among its purposes the bribing of Customs officers. The summation of the prosecutor dramatically presented a picture of use by the defendants of Customs Agents in facilitating the accomplishment of the illegal purposes of the defendants.

*Certiorari* should be granted to examine whether this improper conduct of the prosecutor and the other improper conduct of the prosecutor referred to in the opinion of the Court of Appeals tainted and infected the entire case against all the defendants.

The Court of Appeals in its opinion admits that the comment of the prosecutor upon summation, which amounted to a charge that certain of the defendants lacked the courage to take the stand was improper, citing the decision of this Court in *Wilson* v. *United States,* 149 U. S. 60. The Fifth Amendment to the Constitution of the United States provides that no person shall be compelled in any criminal case to be a witness against himself and Title 18 U. S. C., Sec. 3481 provides that in such a case the failure of an accused to offer himself as a witness shall not create any presumption against him. Such conduct on the part of the prosecutor, departing as it did from both a constitutional norm and a specific command of Congress, cannot be said to be not prejudicial. *Kotteakos* v. *United States,* 328 U. S. 750.

Can such improper conduct be held to be not prejudicial because it occurred in the context of a lengthy trial which in the first instance resulted from the procedure chosen by the prosecutor? How can this improper conduct be justified by the fact that attorneys for some of the defendants re-

ferred to the fact that their clients did not take the stand in their own behalf but were exercising their rights under the Fifth Amendment?

As Mr. Justice Frankfurter wrote in the *Sawyer* case, *supra*, the prosecutor carries a somewhat heavier responsibility in the maintenance of the standards of criminal justice than does counsel for the defense. The general instructions to the jury at the end of the case, certainly, did not cure this improper conduct. The Court overlooks the fact that the prosecutor repeated his comment twice during summation and the Trial Judge made no attempt to correct the improper comments by an immediate rebuke or emphatic condemnation, but instead denied the motions for mistrial without comment.

The decision by the Court of Appeals is in direct conflict not only with the decisions of this Court in *Wilson* v. *United States*, 149 U. S. 60, and *Reagan* v. *United States*, 157 U. S. 301, but decisions in other Circuits. *Demayo* v. *United States*, 32 F. 2d 472 (8th Cir., 1929), *United States* v. *Sprengel*, 103 F. 2d 876 (3rd Cir., 1939). Such an error cannot be cured by an instruction to the jury in the judge's charge. Nothing less than a sharp, immediate and emphatic rebuke by the Court, together with an admonition to the jury to disregard the remarks, can dispel the injurious effect of such a reference. *Wilson* v. *United States, supra; De Mayo* v. *United States*, 32 F. 2d 472 (8th Cir.); *United States* v. *Hamilton*, 97 F. Supp. 127.

## V.

If mass trials upon a charge of a continuing conspiracy are to become an accepted method of procedure in federal prosecutions, then the important question arises which this petition presents—what type of charge will satisfy the requirements of due process? The difficulties of a mass trial

as one court stated are that the summation and charge in such a case if specific and thorough would be too long and complex and if short and concise would be indefinite and incomplete. *United States v. Central Supply Ass'n.*, 6 F. R. D. 526, 534 (Dist. Ct., N. D. Ohio, 1947). In this case, the Trial Judge on the issue of a continuing conspiracy took a short cut and made that issue depend upon the question whether the Government witnesses perjured themselves or not. The only guidance the Trial Judge gave the jury in the vital and crucial issue of a continuing conspiracy was contained in the following portion of the charge referring to the contentions of the defendants (1725a):

> "More specifically, they contend that there is insufficient evidence to show a connection between the alleged acts of Aron, Gelb and others in New York during 1950 and 1952, the conversations and acts in Boston in which Brisbois and Bucelli allegedly participated, the alleged meetings between Stromberg, Vellucci, Teitelbaum, Behrman, Ewing and other in 1954 and 1955; the alleged distribution by Vellucci and Ewing of narcotics of DeSaverio, Puco, Pasqua, Seto and the Lessa brothers, the alleged statements and acts of customs men and the alleged distribution and purchase of narcotics by Maimone and Mirra."
>
> "In short, they contend that the Government witnesses have perjured themselves; and this will be a basic question for you to decide in this case."

This instruction was palpable error and a distortion of the contentions of the defendants. The main witnesses for the Government, Lafitte, Ewing and Basile, testifying as to different periods might still be telling the truth, but proof of one general continuing conspiracy might still be lacking.

The Court of Appeals makes no comment on this portion of the Trial Judge's charge, instead finds comfort in its statement that the jury had the benefit of the summary

of the independent evidence to which so much of the charge was devoted.

It is true that the Trial Judge summarized the "independent evidence" received against each defendant. Although the calendar is the most important exhibit in the charge of a continuing conspiracy (*United States v. Kissel*, 218 U. S. 601, 609), the dates are completely disregarded and no instructions were given to the jury how the respective summaries applicable to each defendant were to be applied in point of time and connected with the charge of a general continuing conspiracy. Instead in many instances events were taken out of their time sequence. Note for example, the Trial Judge's statement of the Government evidence at page 1724a. At that point, the Trial Judge referred to payments made by Stromberg after March 27, 1954. This is followed immediately by the reference to the testimony of the transfer by Aron of sums of money to Baruche's numbered account in a Swiss bank. Actually, these transfers of sums of money to Baruche's numbered account in a Swiss bank occurred from January to July 1951, at least 3 years prior to the time that Stromberg advanced any money. Moreover, there was not a shred of evidence that there was any cable transfer of funds after March 27, 1954.

The colloquial charge of the Trial Judge on the issues of multiple conspiracies (1725a-1726a) left the jury pretty much in the dark. The question of multiple conspiracy is of course a very complicated one. To suggest the Petitioners were protected by this curt statement by the Trial Judge and that the jury could determine the issue with that type of an instruction is to exact gifts of subtlety that not even judges or lawyers, let alone juries, possess. In any event, the charge in this question was erroneous. *Kotteakos v. United States*, 328 U. S. 750.

The statement of the Court of Appeals that the jury had no task of insuperable difficulty to comply with the judge's instructions (Appendix to Petition, p. 14a), is not supported by the record. Enumeration of the independent evidence against each of the defendants without regard to date was hardly an adequate yardstick for a determination of the vital issue of a continuing conspiracy and the participation of each defendant in such a conspiracy. The Trial Judge in his charge to the jury recognized that because of the length and complexity of the trial that the jury faced a "formidable" task but assured the jury optimistically by the exercise of calmness the issues would become comparatively simple (1785a). The Trial Judge during the trial admitted that this case, which was his first experience with a mass trial, placed a tremendous burden on the Trial Judge (Original Record, pp. 4009-4010). Strangely enough, however, both the Trial Court and the Court of Appeals attempted to justify this mass trial upon a complex charge involving an alleged continuous conspiracy for reasons which are either superficial or have no basis in the record. Incidentally, this is the first case in which a Trial Judge saw some advantages in a mass trial, such as the fact that in a mass trial a witness for the Government is cross-examined by many lawyers instead of a few lawyers (Original Record, pp. 4009-4010).

It is difficult to recreate the living scene of this criminal trial, but we believe this cold record alone adequately paints the grim picture. Perhaps, there was an expectation by the prosecutor that the viciousness of the object of this alleged continuing conspiracy—the importation of narcotics—would dull the sensitivity of those responsible for the protection of the rights of the accused and the proper administration of justice. For, on no other reason, can this form of procedure be justified. One of the worst things that

could happen in the administration of the criminal law to judges, lawyers and other officers of the court, would be to lose our capacity for shock. We believe that this record and the opinion of the Court of Appeals demonstrate that in conspiracy cases involving narcotics, the Court of Appeals has lost its capacity for shock.

## CONCLUSION

**For the foregoing reasons, this petition for writ of certiorari should be granted.**

August 11, 1959

Respectfully submitted,

MOSES POLAKOFF
*Attorney for Petitioners*

SAMUEL MEZANSKY,
SHELDON LOWE,
*Of Counsel.*

# APPENDIX A

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 214—October Term, 1958.

(Argued February 4, 1959 Decided June 15, 1959.)

Docket No. 25188

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

HARRY STROMBERG, HENRY TEITELBAUM, JEAN ARON, NATHAN BEHRMAN, MARTIN DE SAVERIO, GEORGE BRISBOIS, HERMAN SAMNICK, BENJAMIN DANIS, SAUL SNYDER, SALVATORE MAIMONE, ANTHONY MIRRA, STEVE PUCO, DANIEL LESSA, NICHOLAS LESSA and LEO SETO,

*Defendants-Appellants.*

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Before:

SWAN, *Circuit Judge,*

MADDEN, *Judge,* United States Court of Claims,*
and HINCKS, *Circuit Judge.*

Appeals from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge.*

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* Sitting by designation pursuant to the provisions of 28 U. S. C. §291(a).

SAMUEL MEZANSKY, New York, N. Y. (Moses Polakoff and Sheldon Lowe, New York, N. Y., on the brief), *for defendant-appellant Harry Stromberg.*

DANIEL H. GREENBERG, New York, N. Y. (Max Fruchtman, New York, N. Y., on the brief), *for defendant-appellant Henry Teitelbaum.*

JOSEPH LEARY DELANEY, New York, N. Y., *for defendants-appellants Jean Aron and Anthony Mirra.*

MAURICE EDELBAUM, New York, N. Y. (Chester E. Kleinberg, New York, N. Y., on the brief), *for defendant-appellant Nathan Behrman.*

FREDERICK B. BOYDEN, New York, N. Y., *for defendant-appellant Martin De Saverio.*

GEORGE FEIT, New York, N. Y., *for defendant-appellant George Brisbois.*

IRWIN KLEIN, New York, N. Y. (Albert H. Ruppar, New York, N. Y., on the brief), *for defendant-appellant Herman Samnick.*

HENRY K. CHAPMAN, New York, N. Y. (Murray E. Gottesman, New York, N. Y., on the brief), *for defendant-appellant Benjamin Danis.*

EDWARD H. LEVINE, New York, N. Y. (Vernon C. Rossner, New York, N. Y., on the brief), *for defendant-appellant Saul Snyder.*

*Appendix A*

MOSES L. KOVE, New York, N. Y., *for defendant-appellant Salvatore Maimone.*

JAMES J. HANRAHAN, New York, N. Y., *for defendant-appellant Steve Puco.*

HENRY K. CHAPMAN, New York, N. Y., *for defendants-appeallants Daniel and Nicholas Lessa.*

MOSES POLAKOFF, New York, N. Y. (Samuel Mezansky, New York, N. Y., on the brief), *for defendant-appellant Leo Seto.*

GEORGE I. GORDON and MARK F. HUGHES, JR., Asst. U. S. Attys., Southern District of New York, New York, N. Y. (Arthur H. Christy, U. S. Atty., Herbert F. Roth, Kevin Thomas Duffy, Otis Pratt Pearsall, Alan W. Richenaker, and Gideon Cashman, Asst. U. S. Attys., S. D. N. Y., New York, N. Y., on the brief), *for the United States.*

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HINCKS, *Circuit Judge*:

Fifteen defendants in this case appeal from judgments of convictions entered against them upon a jury verdict. The indictment, in a single count, charged forty-six defendants and sixteen others under 18 U. S. C. §371 with conspiring to violate 18 U. S. C. §212 (bribery of customs officials), 21 U. S. C. §§173, 174 (narcotics laws) and to

defraud the United States of its right to have the Customs Service administered free from corruption.

Before the trial, two defendants entered guilty pleas. The Government consented to the motions of three defendants for severance and itself moved for severance as to eleven more. Another eleven are fugitives from justice or unidentified. The remaining nineteen were tried together, although a number of them made timely motions for separate trial. The opinion of Judge Palmieri, 22 F. R. D. 513, deals in part with the severance motions, as well as with other pretrial motions. At the end of the Government's case, a judgment of acquittal was directed by the court in favor of one defendant. The jury returned verdicts of guilty against the other eighteen, and fifteen are now before us on appeal.[1]

At the trial, the Government's case depended principally upon the testimony of three witnesses. The first of these, one Lafitte, a Government employee and informer, testified to conversations with a number of the alleged conspirators during the first part of the conspiracy; the whole conspiracy, the indictment charged, continued from 1950 to 1956. In July, 1952, Lafitte met one Aron,[2] who ran several corporations and maintained offices in New York City. Through Aron, Lafitte met a number of the defendants named in the indictment: Gelb,[3] LaBonte,[3] Baruche,[3] and

[1] One defendant, who received a suspended sentence, did not appeal; another died before his appeal could be heard; and on the appeal of a third, the Government confessed error.

[2] A defendant-appellant.

[3] A defendant, not on trial below.

Brisbois[2] whom Aron described as his Canadian representative. This group met frequently at lunch, dinners and at Aron's office; their conversations, according to Lafitte, frequently involved the narcotics trade. In one of these conversations, Gelb told Baruche he was paying too much for heroin in France. There was also discussion of a transaction "with the Boston people" in which $80,000 had been lost; it was generally agreed that a trip to Boston was necessary because the Boston people "would have to be straightened out." Also, the purchase of a coalyard in Boston was under consideration, through which narcotics might be smuggled. Finally, in November, 1952, Aron and Lafitte went to Boston with two others, not accused in the indictment: Gelb did not go because too closely identified with traffic in narcotics. In Boston, they met Brisbois, Moffie,[3] and Bucelli[4] and there was general discussion relating to the smuggling of narcotics. It appeared from the conversations that narcotics had already been smuggled through a Boston coalyard. The success of these further negotiations with the Boston group does not appear in the testimony. Shortly thereafter, however, Aron and Lafitte returned to New York. There the social contacts between Lafitte and Baruche, Gelb and Aron continued. Upon one occasion, Lafitte met Behrman,[2] whose name figues largely in the alleged conspiracy in its later stages. He also testified that he met Samnick[2] and Danis,[2] Customs Inspectors, upon various occasions, in the company of Aron, Gelb and Baruche; and each made a remark about the ease of smuggling goods through Customs. Aron

[4] A defendant who died pending his appeal.

described Samnick to Lafitte as "one of his Customs men." And the active assistance of Customs Inspectors was used as a talking point by Baruche in attempting to persuade Lafitte to join them in the narcotics business. Lafitte chose to remain unpersuaded, however; and, after he had reported his findings to the Government, some time early in 1953, it was apparently thought advisable to let his contact with the Aron group lapse.

Several aspects of Lafitte's testimony were corroborated by minor witnesses not named as defendants. Montfiore testified of dealings with Aron frequently after 1949, at the time when Aron was engaged in importing resistors for television tubes; that in Aron's office, he frequently saw Gelb, Baruche, Danis and Samnick; and that Aron told him that the Customs Inspectors were useful to him in avoiding red tape in getting in resistors by air. He testified further that although Aron said, once, that he owed Samnick and Danis money, he never saw any money passed; but did once see a postdated check, which Aron said was for Samnick. Also that Aron had in 1952 or 1953 described a transaction between Gelb and Baruche in which "Gelb had taken $30,000 from Baruché," Aron remarking that he was "very glad he was out of it."

One Adatto, a nephew of Baruche's who worked for Aron, corroborated that fact that Samnick and Danis were often in Aron's office; he testified that he once sought Samnick's help to expedite te entry of some electronic material for Aron and that he once took part in transferring funds from Gelb and Aron to Baruche in Europe through several Swiss bank accounts.

Finally, one Brenner, Aron's secretary, testified to frequent visits at Aron's office by Gelb, Baruche, Samnick and Danis.

After the period covered by Lafitte's testimony, which described events up to the end of 1952, evidence of the conspiracy breaks off until the end of 1953, when James Ewing, the second major prosecution witness, appeared on the scene. Ewing, himself a dealer in narcotics in Detroit, began to buy narcotics in New York from Vellucci,[5] delivered to him by Tedesco.[5] In answer to a complaint that the narcotics supplied were overly diluted, Vellucci said, according to Ewing, that he was going to deal with the "mob around 50th and Broadway." Aron's office, at this time was at 49th St. Somewhat later, Ewing testified, Vellucci began to purchase from Behrman and Gelb, to whom Ewing was introduced. He testified to one purchase in which the money he paid Vellucci was passed directly on to Gelb.

In March, 1954, Gelb was arrested by Federal Narcotics Agents. Government agents testified to the discovery of huge amounts of narcotics in two apartments used by Gelb where there was also discovered a letter from Baruche to Gelb. And the landlord at one of the apartments testified that Behrman was a frequent caller. According to one witness, Behrman was also seen at Federal Detention Headquarters talking to Gelb, after Gelb's arrest; and there was evidence that a letter was passed, by another witness, from Behrman to Baruche.

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[5] A named coconspirator, not a defendant.

## Appendix A

The arrest of Gelb and the seizure of the huge cache of narcotics, Ewing testified, made it necessary for Vellucci and Behrman to raise from another source at least $50,000 to pay for a shipment of narcotics shortly to arrive from France. Ewing testified that to meet this need they obtained the aid of Stromberg,[2] who advanced them money; that later repayments were made on several occasions, varying in amount from $10,000 to $25,000; that present at these meetings was Teitelbaum,[2] who was a constant companion of Stromberg; that the money obtained from Stromberg was delivered to "Gene's [Baruche's] partner's house"; that he, Ewing, accompanied the deliverer to 39 E. 78th Street, a building in which Aron's apartment was also located, and that after the shipment of narcotics arrived Stromberg was paid off, in installments. According to Ewing, Stromberg continued to finance the imports and once agreed to take steps to settle a jurisdictional dispute with another distribution ring; on one occasion in Ewing's presence money was paid by Vellucci to Teitelbaum for delivery to Stromberg; and after consultation with Stromberg and Vellucci, Behrman made the arrangements with Baruche, the European supplier, passing on to him complaints about the quality of narcotics, and, on one occasion, going to Europe himself.

Ewing testified that Vellucci told him, "We have Customs men paid off," and that Vellucci handled the distribution in New York. In the summer of 1954, Ewing's relationship with Vellucci became closer: while carrying on the distribution of narcotics in Detroit, through agents, he nonetheless managed to spend a great deal of time in New York. He began driving for Vellucci and was present at a number of

meetings with retailers, including De Saverio,[2] the Lessa brothers,[2] Pueo,[2] Seto,[2] and Di Palermo,[3] at which orders were placed and cash, for earlier deliveries, was received. In June or July of 1955, Ewing met Baruche, who had come to the United States in answer to complaints that one shipment of heroin was bad. When the shipment was tested and found bad, in the presence of Vellucci and Behrman, Baruche agreed to bear the expense of replacement.[6] In August of 1955, Ewing was summoned to New York from Detroit by Vellucci; they drove to Hoboken, where they met a Customs Inspector, identified by Ewing as Snyder,[2] who delivered to them two suitcases. Vellucci told Ewing that the suitcases contained heroin; and shortly thereafter, Ewing was paid off for his help, in heroin.

Several aspects of Ewing's story were corroborated by other witnesses. Hart, a woman living with Ewing during the period, testified that she had received a number of deliveries of heroin from Tedesco, Vellucci's agent. And both she and Frank, a Detroit police officer in Ewing's pay, corroborated Ewing's account of a trip to New York and a meeting with Vellucci during which Vellucci showed Ewing how to test cocaine.

The last principal Government witness was one Basile, a narcotics retailer. His testimony related mainly to his source of supply, Di Palermo, whose business was operated in a candystore at 46 Prince Street. A Narcotics Agent testified that he had followed Vellucci and Behrman, in October, 1955, to the same address. Basile testified that he

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[6] It was shown that Baruche was registered at a New York hotel from July 22-29, 1955.

and his partners, Yacono[3] and Maimone,[2] had been supplied with both cocaine and heroin by Di Palermo; that one Greenberg[3] offered to introduce him to Behrman, who would sell him heroin for $7,500 a kilo, which was less than he was then paying Di Palermo; that when apprised of this competition, Di Palermo agreed to sell to him, Basile, for $7,000 a kilo, if Basile would buy in quantity, admitting that Behrman was his source. According to Basile this course of dealing continued without incident, except when a delivery of narcotics at about the beginning of September proved to be inferior. Di Palermo then told him "it's Natie Behrman's goods, it's got to be o.k." Somewhat later, Basile talked to Behrman and Vellucci, who said they had "got hit with a bad batch." On one occasion, Basile saw Di Palermo turn over money to Vellucci. Basile also implicated Mirra[2] and Paradise,[3] who regularly bought narcotics from him.

Upon this evidence, the Government maintains that a single conspiracy, as charged in the indictment, was properly found by the jury and that the convictions must be upheld. More specifically, it urges that Aron and Baruche, operating behind the facade of a legitimate importing business, were the central figures in a syndicate engaged in importing narcotics into this country. The Government maintains that Baruche served as the purchasing agent of narcotics in France throughout the life of the conspiracy; Samnick and Danis, working through Aron, assisted the combine in smuggling narcotics into the country through New York; Bucelli handled the Boston branch of the smuggling operation; Brisbois distributed narcotics through Canada; and Gelb financed the group's activities and

handled the New York distribution. This was the opening phase of the conspiracy which, the Government maintains, was established by the testimony of Lafitte. Subsequent importing and distributing operations were part of the same continuing conspiracy enlarged to include additional members. Thus, after Gelb's arrest, Stromberg became the financier and Vellucci and Behrman became the chiefs of the distributing apparatus. The testimony of Ewing and Basile, it is argued, ties in the other defendants as links in the conspiratorial chain in the later period.

The appellants' main defense consists of an attack on the Government's assertion that a single and continuing conspiracy was proved. They point to the time gap, between December, 1952, when Lafitte's testimony ends, and December, 1953, when Ewing's begins. In this contention, they rely principally upon *United States* v. *Russano*, 2 Cir., 257 F. 2d 712.

It is true that many of the actors in the group described by Lafitte are not seen again after December 1952: Brisbois, Bucelli, Samnick and Danis do not reappear, and the evidence connecting Aron to the later period is slight. The links mainly relied upon by the Government are Baruche, Gelb and Behrman. We think Behrman's one reported appearance at Aron's office is hardly strong enough to tie him to the conspiracy before 1953; but Baruche and Gelb were both central participants in each phase, until Gelb's arrest in early 1954. In *United States* v. *Russano, supra,* there was some positive evidence that the first conspiracy had ceased between 1952 and 1955, when the second com-

menced. We find no parallel evidence here: Gelb and Baruche's activities, central to both phases, were exactly the same after the gap in testimony as before, and no intervening change was shown. See *United States* v. *Liss*, 2 Cir., 137 F. 2d 995, cert. denied 320 U. S. 773. A conspiracy, once established, is presumed to continue until the contrary is shown. *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, cert. denied 323 U. S. 799; *Hyde* v. *United States*, 225 U. S. 347; *Poliafico* v. *United States*, 8 Cir., 237 F. 2d 97, cert. denied 352 U. S. 1025; *Marino* v. *United States*, 9 Cir., 91 F. 2d 691. We hold there was sufficient evidence to go to the jury as to the existence of a single continuing conspiracy.

This conclusion is not invalidated by the absence of evidence to show that some of the "New York members" of the alleged conspiracy, including the Customs officers, knew of the existence of the "Boston members" or their operations in Boston or Canada, and vice versa. For this is not the case of a "circle conspiracy"[7] such as was involved in *Kotteakos* v. *United States*, 328 U. S. 750, or of a single transaction such as in *United States* v. *Peoni*, 2 Cir., 100 F. 2d 401. Here the evidence plainly supported a "chain" type conspiracy[7] such as was involved in *Blumenthal* v. *United States*, 332 U. S. 539, 556-7; *United States* v. *Bruno*, 2 Cir., 105 F. 2d 921, reversed on other grounds, 308 U. S. 287; *United States* v. *Cohen*, *supra*; *United States* v. *Rich*, 2 Cir., 262 F. 2d 415; *United States* v. *Carminati*, 2 Cir., 247 F. 2d 640, cert. denied 355 U. S. 883; *United States* v. *Tramaglino*, 2 Cir., 197 F. 2d 928, cert. denied 344 U. S. 864.

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[7] 57 Columbia Law Rev. 387, 390.

For here there was evidence of a core of conspirators (Aron, Barreche and Gelb)[8] who were buying, importing, and distributing narcotics for sale in large quantities in successive transactions. As the cases above cited show, from such evidence it might rationally be inferred that one joining such a conspiracy knew that it had a scope and that, for its successful operation, it required a widespread organization, more comprehensive than may have been disclosed by any contact or transaction of which he had knowledge through his actual personal participation. Thus activities by Boston conspirators in Boston were not outside the scope of the conspiratorial agreement merely because not shown to have been specifically known to certain of the New York conspirators, and vice versa. Each defendant, once found to be a member whatever the level of his participation may have been, might be found intentionally to have contributed to the success of the overall conspiracy.

The appellants also contend that the convictions should be reversed because obtained in "a mass trial" in which so many defendants were involved that, especially in view of the complex issues and the volume of evidence received "subject to connection,"[9] the jury could not properly evaluate and apply the evidence to the individual defendants. Here too we disagree. In so holding, we do not rest upon

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[8] There was substantial evidence that after Gelb's arrest his functions in the conspiracy were taken over by Stromberg and Vellucci.

[9] Principally, evidence of the acts and declarations of alleged co-conspirators which according to the judge's ruling was not to be considered against a particular defendant unless he were found by independent evidence to be a member of the conspiracy.

the fact that the mere number of defendants on trial, or of alleged conspirators involved, was no greater than in other cases in which convictions have been affirmed, such as the *Bruno* and *Cohen* cases, cited above. *United States* v. *Falcone*, 2 Cir., 109 F. 2d 579, aff'd 311 U. S. 205. Nor do we think it determinative that no abuse of discretion was shown in denying below pretrial motions for severance. We place our holding squarely on the fact that, in the context of this trial, nothing in the issues, the evidence or the rulings warrants a conclusion that the number of the defendants prevented the jury from appraising the independent evidence against each defendant and meting out individual justice under the law.

Broadly viewed, the Government's case rested on the testimony of three witnesses, Lafitte, Ewing and Basile, whose credibility was vigorously assailed by the defendants. Surely it was not beyond the capacity of the jury to decide whether these witnesses were to be believed. And once it was determined that these witnesses were to be believed and that the acts and declarations of the defendants and their alleged coconspirators, to which these witnesses had testified, had indeed been made, we think it by no means a task of insuperable difficulty for the jury to comply with the judge's instructions[10] and determine as to each defendant the issue of membership in a single continuing conspiracy

[10] The judge charged:

"In your consideration, then, of the evidence you should first determine whether or not the conspiracy to import and distribute existed as charged in the indictment. If you conclude that such conspiracy did exist, you should next determine as to each defendant separately whether or not he or she was a party to or member of the conspiracy, with knowledge

on the basis of the independent evidence—i.e., the evidence as to his own acts and admissions..

There was nothing particularly complicated about the independent evidence which connected each defendant to the conspiracy. It's application involved the usual jury task of collating the separate items of independent evidence relating to each defendant and determining whether in sum

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of its illegal purpose and with the intention to assist the conspiracy to achieve its illegal objective.

"In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements or declarations of others. That is to say, you must determine the issue as to his or her membership in the conspiracy from his or her own statements or declarations or acts or conduct.

"If and when the existence of the conspiracy charged in the indictment and the membership or any or all of the defendants in such conspiracy has been found, then the acts done and the statements or declarations made by any person found by you to be a member of the conspiracy may be considered in connection with the case as to any defendant whom you find to have been a member of the conspiracy even though such acts and declarations may have been made in the absence and without the knowledge of such defendant, provided such acts were done and such statements or declarations were made during the continuance of such conspiracy and in furtherance of an objective or purpose of the conspiracy.

"So, if you conclude from the evidence that a defendant was a member of the conspiracy and you do so based upon the independent evidence, as I have already told you, based upon his own acts or her own acts or her declarations, or her or his conduct, you may then consider as if made by him or her any statements or declarations of other members of the conspiracy, even though they are not named as defendants in the indictment, provided such statements or declarations were made during the existence of the conspiracy and in furtherance of an object or purpose of the conspiracy as charged in the indictment."

total it warranted the inference of membership. To be sure, because of the number of the defendants and the exigencies of trial the several items of direct evidence relating to a particular defendant were interspersed throughout a record comprehensive enough to cover all. But even if it might have taxed the capacity of a jury single-handed, with memory of the evidence unrefreshed, to filter out and collate the several items of evidence relating to the connection of each defendant, this jury had the aid of a summary of such evidence given by the judge in his charge. Notwithstanding the number of defendants, we are confident that aided by the judge's charge the jury had in mind the evidence unconditionally received against each defendant which linked him with the conspiracy.

It is true, that in addition to the independent evidence of the acts and declarations of the individual defendants, there were before the jury, subject to connection, numerous incriminating hearsay declarations of coconspirators which under the judge's charge were competent only against such defendants as were found by the jury to be linked to the conspiracy by independent evidence and only if made in the furtherance of the conspiracy. The appellants contend that with so many defendants on trial the jury could not keep these two categories separate. But as Judge Hand pointed out in *United States* v. *Dennis*, 183 F. 2d 201, 230-231, aff'd on other grounds 341 U. S. 494, it was, at least under the preferred doctrine, a preliminary question for the judge to decide as to each defendant whether, if the Government's witnesses were believed, he and the various declarants were engaged in a common conspiracy which the declarations helped to realize: it was for the jury on all the evidence "to decide whether they believed the wit-

nesses beyond a reasonable doubt." In this view of the law, if the judge, taking the testimony of the Government witnesses as true, decides that a given declarant and a given defendant were engaged in a common conspiracy, which the declarations helped to realize, the declarations of the co-conspirators are left "to the jury to use like any other evidence • • • " And there is no need for the jury "to keep their minds in isolated compartments" as would be the case if the preliminary question were left to the jury. See also *Glasser* v. *United States*, 315 U. S. 60, 74; *United States* v. *Pugliese*, 2 Cir., 153 F. 2d 497; *United States* v. *Compagna*, 146 F. 2d 524, cert. denied 324 U. S. 867. Accordingly, once the judge by his denial of motions for judgments of acquittal made at the close of the Government's case had himself decided the preliminary question as to whether the declarations of coconspirators in the execution of the conspiracy had been connected under the rule of the *Dennis* and *Pugliese* cases, there was no need for the jury to keep the evidence of declarations conditionally received in "isolated compartments" of their minds.

Here, as Judge Hand suggested in his opinion in the *Dennis* case, the charge was overly favorable to the defendants. For the judge, by denying the motions for acquittal, himself decided as to each defendant the preliminary question of connection to the conspiracy by independent evidence.[10a] Yet he instructed the jury that only if it also de-

[10a] That the judge properly exercised his function in this respect is demonstrated by the judgment of acquittal of the defendant Lewis granted at the close of the Government's case. The judgment was granted on the express ground that there was insufficient independent evidence to connect Lewis with the conspiracy.

cided the preliminary question adversely to a defendant could it proceed to consideration of the ultimate issue of his guilt beyond a reasonable doubt on all the evidence. The error, since in favor of the defendants, is of course not ground for reversal.

Moreover, we must not lose sight of the fact that the difficulties which the appellants envisage stem from the number of conspirators rather than the number of defendants on trial. The same evidence would have been admissible similarly subject to connection and the same problems would have arisen if each of the appellants had been tried separately. In the one situation as in the other, the number of conspirators would have been the same. *United States* v. *Carminati, supra.* And of course conspirators are not entitled to immunity merely because their number is great. *United States* v. *Cohen, supra; Kotteakos* v. *United States, supra.* Indeed, broadly considered the large conspiracies are potentially more dangerous than the small ones.

The foregoing holdings, however, do not finally dispose of the objections of a number of the individual defendants that the evidence was insufficient to support a finding that each was a member of the conspiracy. Most of these objections are directed at the credibility of the principal Government witnesses. In so far as this is the case, they will be disregarded, for of course it is not the function of an appellate court to redetermine controverted issues already decided by the jury. *Cramer* v. *United States,* 325 U. S. 1; *United States* v. *Markman,* 2 Cir., 193 2d 574; *United States* v. *Compagna, supra; United States* v. *Manton,* 2 Cir., 107 F. 2d 834, cert. denied 309 U. S. 664. But it is

incumbent upon us to examine contentions that even if the Government witnesses are believed the independent evidence connecting each defendant with the conspiracy is insufficient to sustain his conviction. *Glasser* v. *United States, supra.*

As to the appellants Samnick and Danis, we are unable to find evidence which warranted submission to the jury. Much of the evidence relating to them was hearsay: Lafitte testified that Aron described each as one of his Customs men, but not in their presence; a check, drawn by Aron payable to cash was said by him to be for Samnick, again not in his presence. Each, to be sure, was frequently in Aron's office and was frequently entertained; and Samnick, upon at least one occasion, was called to expedite the entry of resistors for Aron's apparently legitimate importation business. But mere association with conspirators is insufficient basis for a finding of participation. *Di Re* v. *United States,* 332 U. S. 581; *Aikens* v. *United States,* D. C. Cir., 231 F. 2d 66; *United States* v. *Moloney,* 7 Cir., 200 F. 2d 344. The only proof which could possibly be considered independent evidence of participation consists of the statements, one by each of these two defendants, made to Lafitte.[11]. As to one of these statements, it is not clear that the subject-matter was narcotics rather than resistors. And each might not unreasonably be construed only as hypothetical comment: after all, there was no evidence

[11] In response to Lafitte's statement that big packages of narcotics were difficult to get through Customers, Samnick is reported to have said. "By boat or by plane the best way to do it is to use two big suitcases." Danis, upon another occasion, is reported to have said that "if he wanted, he can go with a truck across."

whatever that either Samnick or Danis had ever actually used the smuggling technique which they mentioned. It may seem strange that narcotics conspirators should discuss such techniques at luncheon with friends not members of the conspiracy. But no inference unfavorable to these defendants may be drawn from this fact: Lafitte's own testimony shows that they discussed their nefarious business with him knowing that he was not a coconspirator. As to these two defendants, the independent evidence was too slight to warrant the admission of hearsay declarations and too slight to submit to the jury. Their motions for a directed verdict should have been granted.

We also think that the conviction of the appellant Snyder must be reversed. At the trial, it was stipulated that Snyder had been introduced to either Aron or Baruche in 1949, before the conspiracy began. Aside from this, which standing alone was insufficient to support a conviction, the only incident connecting Snyder with the conspiracy is the delivery of two suitcases, later found to contain heroin, to Vellucci and Ewin in Hoboken.[12] In *United States* v. *Reina*, 2 Cir., 242 F. 2d 302, cert. denied *sub nom. Moccio* v. *United States*, 354 U. S. 913, we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. For aught that appears in this record, this was Snyder's only transaction with the group; under

[12] Snyder's conviction rests upon the jury's acceptance of Ewing's identification of him and upon the jury's rejection of Snyder's very plausable alibi. But these are questions of fact, which, we have held, are not reviewable here. On the identification point, see *Zammar* v. *United States*, 8 Cir., 217 F. 2d 223.

the reasoning of the *Reina* case, the evidence is insufficient to support the inference that Snyder knew or accepted the conspiratorial aims or that his participation went beyond the single transaction.

The apppellants De Saverio and Seto also invoke the *Reina* decision. But the evidence against both of these appellants was not limited to a single transaction. As to De Saverio Ewing testified to a conversation between De Saverio and Vellucci about the amount of money, $12,000, owed to Vellucci "for the balance of a kilo and part on a kilo that he had not paid for." Taking the conversation in context, we think that, in the light of the evidence of the amount of narcotics involved and the manner of payment, a jury might reasonably infer the two were discussing payment for more than a single sale and that both understood that the narcotics involved were bought for distribution at retail. Moreover, upon another occasion Ewing was present when De Saverio paid Vellucci money. This aspect of the case was fairly put to the jury by the trial judge's charge. And to Seto also, we think, the *Reina* decision is inapplicable. For Ewing testified to an order by Seto from Vellucci in the summer of 1954 and to a second order in May, 1955. And he described these as two of half a dozen transactions in all.

De Saverio also insists that it was error for the judge to refuse a charge as to evidence relating to his attempted impeachment of Ewing's testimony against him. Ewing had testified that the transactions between Vellucci and De Saverio took place in De Saverio's club in 1954 and on cross-examination he had described the layout and furnish-

ings of the club where the business between Vellucci and De Saverio was carried on. The defense called two former members of the club who testified to changes in the layout and furnishings made, they said, in the spring of 1955 and described the premises before and after the changes. Ewing's description, which purported to be that of the premises as existing in 1954, more nearly resembled, according to testimony of the defense witnesses, the premises as they were after the changes. To explain this apparent conflict the prosecutor on summation suggested that the conversations which implicated De Saverio might have occurred on a visit to the club in 1955 after the changes had been made, pointing out that there was no evidence that Ewing had not been there in 1955. To this the defense objected and, to bolster its attempt to impeach Ewing's testimony, De Saverio's counsel at the close of the Government's summations requested a charge that there was no evidence that Ewing had been in the club in 1955. It is the refusal so to charge that is now assigned as error. We think the claim of error is without substance. When the prosecutor's summation was interrupted by the objection, the judge said: "I don't think there was any evidence that they [Ewing and Vellucci] continued to go there [to De Saverio's club] in 1955." In his summary of the Government's case against De Saverio he called attention to Ewing's testimony that the visit to the club was in *1954*[13] and to the conflict between Ewing's testimony as to the visit

[13] Ewing placed the visit to De Saverio's club a week after his first meeting him in another bar. When asked as to the time of the first meeting, Ewing said: "I believe it was the summer of '53—'54." When pressed more closely he said: "The summer of 1954."

in 1954 and his description of the club as it then existed, on the one hand, and the testimony of the defense witnesses, on the other. He instructed the jury that they must acquit De Saverio if they did not believe Ewing's testimony. And he instructed generally that it was for the jury to determine what the testimony was, not from the assertions of counsel but from their own recollection. We think that the defendant's rights were sufficiently guarded and that the issue was properly submitted to the jury without the requested charge as to the absence of evidence of any post-1954 visit. See *United States* v. *Rosenberg*, 2 Cir., 195 F. 2d 583, 597-598, cert. denied 344 U. S. 838.

The appellant Teitelbaum also objects that there was insufficient evidence to connect him with the conspiracy. Ewing testified that Teitelbaum was always present, with Stromberg, when Vellucci and Behrman met Stromberg for the purpose of discussing the financing of narcotics shipments. However, several of these conversations neither Teitelbaum nor Ewing were able to hear, since they remained at the bar while the others discussed business around a table some distance away. Nevertheless, Teitelbaum was present, although not a participant, during at least two other conversations dealing with narcotics. From these, the jury might fairly believe that Teitelbaum knew of the common plan. And there was testimony that he delivered a payment from Vellucci to Stromberg upon one occasion and that at the same time he discussed the purposes of the conspiracy with Vellucci. As to Teitelbaum, we hold that the jury's conclusion was warranted.

*Appendix A*

Other appellants also contend that the evidence was insufficient to support their convictions. Except as to Samnick, Danis and Snyder, we overrule this claim of error. We have reviewed the evidence against each and conclude that the sufficiency of the Government's proof was so plain that further comment on this claim of error will serve no useful purpose. We turn therefore, to consider claims of specific error.

The appellant Behrman and several others ascribe prejudicial error based upon Ewing's response to a question upon cross-examination. Ewing was being questioned as to his failure to mention Behrman's name in his testimony before the grand jury. The cross-examiner was pressing for a direct answer; the witness replied that he was unable to give one without an explanation. The judge ruled that he might answer and then explain. The witness then said: "No, I didn't mention his name in there because at that time I was not dealing with Nathan Behrman. *At that time Nathan was in jail.*"

There can be no doubt that the testimony above italicized was inadmissible; and to Behrman at least, it was also prejudicial. However, the answer was unforeseeable: plainly it had not been induced by the prosecution. The judge immediately struck out the testimony and instructed the jury to disregard it, adding "You are to pay no attention to that remark in any way. You are to disregard it completely." And the incident was an isolated one during the course of a long trial. These considerations distinguish the case from *United States* v. *Tomaiolo*, 2 Cir., 249 F. 2d 683, at page 695, where reversal was based on an

accumulation of errors. We are of the opinion that in the setting of this case the prompt instruction to disregard the answer cured the error. *United States* v. *Giallo*, 2 Cir., 206 F. 2d 207, aff'd 346 U. S. 929; *United States* v. *Curzio*, 3 Cir., 179 F. 2d 380; see *United States* v. *Apuzzo*, 2 Cir., 245 F. 2d 416, cert. denied 355 U. S. 831.

As is not unusual in an appeal from a fiercely contested and important trial, numerous claims of error are based on the conduct of the prosecutor. First, we will consider the prejudice claimed to have resulted from a public speech made[14] by the United States Attorney after the trial had begun in which he expatiated on the menace of organized crime. The speech was reported in at least two newspapers; in the New York Herald Tribune, it occupied a prominent place on the editorial page. As reported, the speech dealt with two major crime syndicates operating in New York and Chicago, alleged to have millions of dollars at their disposal to encourage activities in "gambling, racketeering and other illicit traffic * * *"; it was suggested that the Mafia was the connecting link between the syndicates and that one of the objects for which their financial power was used was "to influence and buy elected public officials and law-enforcement agents." Later in the article, the Federal Bureau of Narcotics was mentioned among the federal enforcement agencies which constituted an "important element in this campaign against organized crime." No reference was made to this case or to any of the defendants.

[14] The speech was made on a prior invitation to address the alumni of a large law school.

We think it unfortunate and undesirable for the prosecutor to make such a speech while conducting an important criminal trial. The effect may be so to stimulate outside pressures on the jury, through press and radio publicity, that a defendant's right to a fair trial may be impaired. Such pressures, even when not induced by the prosecutor, have sometimes been held to constitute sufficient ground for a new trial. See *Delaney* v. *United States*, 1 Cir., 199 F. 2d 107. But the problem here is not to state the preferred rule of practice, but rather with the aid of hindsight to assess the effect of the act upon this particular jury. See *Delaney* v. *United States, supra; United States* v. *Allied Stevedoring Corp.*, 2 Cir., 241 F. 2d 925, cert. denied 353 U. S. 984. In this case, the trial judge, after determining that several of the jurors had seen the article, immediately admonished them to disregard it and not to discuss it with anyone so that "the trial does not become adulterated by anything outside which may affect the jury." Doubts have been expressed about the effectiveness of such judicial admonitions. See *United States* v. *Leviton*, 2 Cir., 193 F. 2d 848, 865-867; *United States* v. *Keegan*, 2 Cir., 141 F. 2d 248, reversed on other grounds 325 U. S. 478; *Delaney* v. *United States, supra*. However, the content of this article differed little from much contemporary writing in the press on the general subject of organized crime and law enforcement. Its tendency to create prejudice against any of the defendants then on trial was neither direct nor strong. *United States* v. *Allied Stevedoring Corp., supra*. Only the fact that this speech was made by the prosecutor gives any color at all to the claim of prejudice now raised. Because

the article contained comment about the bribery of law-enforcement agents, it may have had a more direct thrust against the Customs officers on trial below than against the other appellants. And for other reasons set forth above, we have held that the verdicts against them cannot stand. As to the other appellants, we conclude that the possibility of resulting prejudice, especially in view of the judge's admonition, was too remote to affect the fairness of the trial or the validity of the convictions. *United States* v. *Allied Stevedoring Corp., supra.* In *United States* v. *Postma,* 2 Cir., 242 F. 2d 488, cert. denied 354 U. S. 922, convictions were affirmed in spite of contemporary newspaper publicity distinctly more damaging to the defendants than the article involved in this case.

Many other complaints are made about the conduct of the United States Attorney during the course of the trial. Most of these relate to his summation. The appellants, relying upon *Berger* v. *United States,* 295 U. S. 78, and *United States* v. *Spangelet,* 2 Cir., 258 F. 2d 338, assert that the United States Attorney placed his own integrity in the scales to support the credibility of his witnesses and that he improperly stated that he would never engage in any unfair tactics. It is true that in *United States* v. *Spangelet, supra,* we reversed where the prosecutor supported the credibility of a government witness by the statement that he had never made a deal. This summation, however, is in a radically different posture, because of the charges made by defense counsel in their summation. These charges need not be detailed at length: there were statements that two Government employees had "framed"

the defendants; that the United States Attorney had no choice but to prosecute the defendants; and that he himself did not believe the prosecution witnesses. In replying to these charges, the United States Attorney was well within his rights. See *Lawn v. United States*, 355 U. S. 339, 359 n. 15, affirming *United States* v. *Giglio*, 2 Cir., 232 F. 2d 589; *Henderson* v. *United States*, 6 Cir., 218 F. 2d 14; *Malone* v. *United States*, 7 Cir., 94 F. 2d 281, cert. denied 304 U. S. 562.

However, one comment in the Government's summation we must hold to constitute error. In discussing the corroboration of the Government's witnesses, the United States Attorney remarked: "Even Brisbois, who had the courage to take the stand • • • " Objections were immediately and properly taken. The comment was improper because it indirectly called attention to the failure of other defendants to take the stand: it was tantamount to saying that certain of the defendants lacked the courage to take the stand. *Wilson v. United States*, 149 U. S. 60; *Rice* v. *United States*, 2 Cir., 35 F. 2d 689, cert. denied 281 U. S. 730; *Morrison* v. *United States*, 8 Cir., 6 F. 2d 809. Nevertheless, in the context of this long trial, we think the incident not so prejudicial as to require a new trial. Several of the defendants' counsel had already commented upon their clients' failure to take the stand and had informed the jury that no adverse inference was to be drawn therefrom. Furthermore, Brisbois' counsel had emphasized that his client had taken the stand. The damaging fact had therefore already been put before the jury by the defense. Cf. *United States* v. *Feinberg*, 2 Cir., 140 F. 2d 592, 595. Moreover, a clear instruction to the jury was included in

the judge's charge. This, we have held, may cure such error. *United States* v. *DeVasto*, 2 Cir., 52 F. 2d 26, cert. denied 284 U. S. 678; *United States* v. *Di Carlo*, 2 Cir., 64 F. 2d 15; see *Wilson* v. *United States*, *supra*.

We hold also that reversible error is not to be found in the prosecutor's remark, after Ewing was asked his address, "Don't be afraid to give it to us." The judge immediately reproved the prosecutor and admonished the jury that the remark was to be disregarded. *United States* v. *Achilli*, 7 Cir., 234 F. 2d 797, aff'd 353 U. S. 373. Indeed, we doubt that the jury would have perceived any prejudicial connotation in the remark were it not for the objections it evoked. And, lastly, the prosecutor's remark, upon summation, that Ewing was living under guard in a Brooklyn hotel was a fair response, we hold, to the defense contention that he was living off the fat of the land. That the remark carried a possible implication that the guard was for Ewing's protection may not have been perceived by the jury until raised by the defense. For it was known to the jury that Ewing was a convicted criminal awaiting sentence. Upon objection, however, the judge again gave the jury an appropriate admonition.

To support their attack on the conduct of the prosecutor, counsel cites *Handford* v. *United States*, 359 U. S. 120, in which the decision reported in 260 F. 2d 890 was reversed in a brief *Per Curiam* "[u]pon consideration of the entire record and the confession of error by the Solicitor General." Counsel have made available to us the Solicitor General's memorandum in response to Handford's petition for certiorari from which it appears that in the *Handford*

trial the prosecutor, in his summation, had wholly without warrant made a prejudicial reference to the defendant's financial affluence. There was no comparable comment made in the case at bar. The appellants complain of the following observation of the prosecutor: "I am not going to deal in generalities; I haven't got time. I have been allowed five hours to answer 15 hours of the most subtle argument, cleverly distorted pictures of parts of the case, by the most able criminal lawyers practicing before any bar of justice." We fail to understand how this passage, which merely returned the compliment which the defendants had paid to the skill of the prosecutor, can be thought to deserve the censure implicit in the *Handford Per Curiam*. This and the other passages which the appellants criticize we think constituted no more than fair and vigorous advocacy: it was argument called for in response to arguments made in the summations for the appellants.

We proceed now to a consideration of various miscellaneous claims of error. Relying upon a statement in *United States* v. *Aron*, 2 Cir., 239 F. 2d 857, appellants contend that the statements made by Aron to Lafitte were extrajudicial admissions, for which corroboration is required. *Opper* v. *United States*, 348 U. S. 84. We find that Lafitte's testimony below was corroborated in many particulars—the story of the Boston trip, for example, was supported by the testimony of Taylor. But we need not rest upon this to overrule this claim of error. For it is clear that in the context of this case of Aron's declarations cannot properly be classified as extrajudicial admissions. They were made during the life of the conspiracy and were not therefore admissions after the fact. See *Smith* v. *United*

*States,* 348 U. S. 147, 155; *Warszower* v. *United States,* 312 U. S. 342. They were in furtherance of the conspiracy, since, as Lafitte testified, Gelb, Baruche and Aron were seeking his participation. And they were not subject to those weaknesses which characterize admissions or confessions made under pressure of police investigation. *Smith* v. *United States, supra; United States* v. *Winston,* 7 Cir., 222 F. 2d 323. In short, they were not admissions for which corroboration is legally required.

The appellant Mirra contends that "in a mass trial such as here," he was entitled as of right to a charge that the Government's evidence against him through the testimony of Basile, a coconspirator, was uncorroborated; a charge explaining what uncorroborated testimony is; and a charge that uncorroborated testimony of an accomplice should be scrutinized with great caution. He cites no cases which support these contentions. The applicable law does not require the corroboration of accomplice testimony. *Caminetti* v. *United States,* 242 U. S. 470, 495; *United States* v. *Moran,* 2 Cir., 151 F. 2d 661, 167 A. L. R. 403; *United States* v. *Schwartz,* 2 Cir., 150 F. 2d 627, cert. denied 326 U. S. 757; *United States* v. *Quinn,* 2 Cir., 124 F. 2d 378; *United States* v. *Gallo,* 2 Cir., 123 F. 2d 229. Nor would omission of a charge about the necessary caution with which a jury should approach accomplice testimony necessarily constitute reversible error, although it is the better practice to give it. *Caminetti* v. *United States, supra; United States* v. *Wilson,* 2 Cir., 154 F. 2d 802, vacated for resentencing 328 U. S. 823; *Pittsburgh Plate Glass Co.* v. *United States,* 4 Cir., 260 F. 2d 397, cert. limited to another

question 358 U. S. 917; *United States* v. *Bucur*, 7 Cir., 194 F. 2d 297. Here, it is true that the Government's whole case against Mirra rested on the uncorroborated testimony of Basile, a coconspirator. But in his charge the judge pointed out that counsel for Mirra contended that Basile's testimony had been discredited and that there was some evidence of friction between Basile and Mirra. He charged explicitly that "if you do not believe the testimony of Basile concerning the defendant Mirra, then you must find Mirra not guilty." This was followed by comprehensive and lucid general instructions as to the tests of credibility. We find no error in Mirra's conviction.

The appellants also complain that they were denied access to a report to which they claim to have been entitled under the rule of *Jencks* v. *United States*, 353 U. S. 657. The "report" in question was a summary by a Government narcotics agent of interviews with the Government witness, Ewing, prepared partly from recollection and partly from contemporary jottings over a period of about eight months. The report was in the agent's language, not Ewing's, and it had never been shown to, or adopted by, Ewing. When these facts had been developed in a hearing, the judge after seeing the report sustained the Government's refusal to disclose this report to the defense[15] upon the ground that it was not "substantially verbatim" nor "recorded contemporaneously" and hence not within the purview of 18 U. S. C. A. §3500. The ruling was plainly right. The

[15] After Ewing's direct examination, the Government delivered to the defense 260 pages of his contemporaneously recorded and substantially verbatim statements as well as his grand jury testimony.

appellants, however, contend that to the extent that §3500 restricts the right of inspection under the *Jencks* rule it is unconstitutional. As to this, unless and until the Supreme Court rules otherwise we shall adhere to the position which we took in *United States* v. *Spangelet, supra; United States* v. *Palermo,* 2 Cir., 258 F. 2d 397, cert. granted 358 U. S. 905; and *United States* v. *Lev,* 2 Cir., 258 F. 2d 9, cert. granted 358 U. S. 903. We hold that the enactment of §3500 was a valid exercise of Congressional power.

It is also urged that the trial judge unduly limited the cross-examination of certain witnesses. The claimed errors relating to the cross-examination of Lafitte may be quickly disposed of. The first of these relates to the trial judge's refusal to allow inquiry as to Lafitte's address. See *Alford* v. *United States,* 282 U. S. 687. However, somewhat later he instructed the United States Attorney to turn the address over to the defendants, whereupon defense counsel specifically withdrew their request. Moreover, the cross-examination directed to Lafitte's background was so complete and searching that we think it would have been proper for the trial judge to decide that the subject of his credibility had been thoroughly explored and to call a halt to this aspect of the cross-examination. *Alford* v. *United States, supra,* at page 694; McCormick, Evidence (1954 ed.), page 56. The same rule is dispositive of the objections to certain matters relating to Ewing's testimony. Ewing had been convicted, by court martial, of desertion and of sodomy. The records of these convictions were introduced during his cross-examination. Upon Ewing's denial that he committed the homosexual act and his assertion that he could not re-

member whether any witnesses had testified against him, the defense sought to introduce the transcript of the court-martial proceedings. This it was not permitted to do. The evidence was asserted to be relevant to impeach credibility. But the particular matter involved went far beyond establishing a criminal conviction. It was a collateral matter, and we think the trial judge wisely exercised his discretion in excluding it. *United States* v. *Tomaiolo, supra; United States* v. *Miller,* 2 Cir., 246 F. 2d 486, cert. denied 355 U. S. 905. The cross-examination of Ewing which lasted for seven days was mostly devoted to attempted impeachment. Plain common sense precludes a holding that the inquiry was unduly restricted.

We have considered all other questions raised by the appellants and conclude that they lack sufficient merit to warrant further discussion.

The court extends its thanks to Messrs. Boyden, Delaney, and Polakoff for their exceedingly able representation of the appellants De Saverio, Aron and Seto as assigned counsel in this long and involved appeal.

For reasons already stated, the convictions of Samnick, Danis and Snyder are reversed and remanded with directions to dismiss. *Yates* v. *United States,* 354 U. S. 298; *Bryan* v. *United States,* 338 U. S. 552; *United States* v. *Silverman,* 2 Cir., 248 F. 2d 671, cert. denied 355 U. S. 942. The convictions of all the other appellants are affirmed.

# APPENDIX B

## Constitutional Provisions, Statutes and Rules Involved

UNITED STATES CONSTITUTION, AMENDMENT V., provides in pertinent part:

> "No person * * *; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *".

UNITED STATES CONSTITUTION, AMENDMENT VI., provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

TITLE 18, UNITED STATES CODE, SEC. 212, provides as follows:

> "Sec. 212. *Offer or threat to customs officer or employee.*
>
> Whoever gives, offers, or promises any money or thing of value, directly or indirectly, to any officer or employee of the United States in consideration of or for any act or omission contrary to law in connection with or pertaining to the importation, * * * of merchandise * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Evidence, satisfactory to the court, of such giving, offering, or promising to give, or attempting to influence or control, shall be prima facie evidence that the same was contrary to law."

TITLE 21, UNITED STATES CODE, SEC. 173, provides in pertinent part, as follows:

"Sec. 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; • • •."

TITLE 21, UNITED STATES CODE, SEC. 174, provides as follows:

"Sec. 174. *Same; penalty; evidence.* If any person fraudulently or knowingly imports or brings any narcotic drug into the United States • • • such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

TITLE 18, UNITED STATES CODE, SEC. 371, provides in pertinent part, as follows:

"Sec. 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy,

each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * * "

TITLE 18, United States Code Annotated, Section 3500, provides as follows:

"DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter

of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in sub-sections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

TITLE 18, UNITED STATES CODE, SEC. 3481 provides:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. June 25, 1948, c. 645, 62 Stat. 833."

RULE 14 of the FEDERAL RULES OF CRIMINAL PROCEDURE, provides as follows:

"Rule 14. *Relief from Prejudicial Joinder.*

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."